Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

VOLVO CONSTRUCTION EQUIPMENT NORTH AMERICA, INC.,
Petitioner,

v.

ISAAC ROSE, PEGGY H. KNOX; JOSEPH E. HENDERSON; WILBERT WHITT; OPAL B. WHITT; ANDREW J. BERGANT, JR.; A.C. WADE; METRO BURTYK; INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 16, 2009

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QUESTION PRESENTED

Whether healthcare and life insurance benefits granted to Respondents in a collective bargaining agreement should be presumed to survive termination of the agreement and become vested for Respondents' lifetime.

PARTIES TO PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Volvo Construction Equipment North America, Inc. The Petitioner was the defendant-appellant below. The Respondents, plaintiffs-appellees below, are listed on the front cover caption.

Petitioner Volvo Construction Equipment North America, Inc. is part of the Volvo Group of companies and is a wholly-owned subsidiary of a Swedish company, Volvo AB, its publicly-traded parent company.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

I. INTRODUCTION 3

II. FACTS 5

A. The Parties 5

B. The 1983-1986 Collective Bargaining Agreement Which Forms The Basis For Respondents' Claims 6

1. Retiree health insurance benefits 7

2. Retiree life insurance benefits 8

C. Later Collective Bargaining Agreements .. 9

D. Respondents' Settlement With EHHE and HCM 10

III. PROCEEDINGS BELOW 11

REASONS FOR GRANTING THE WRIT 14

I. THE CIRCUITS ARE SPLIT SEVERAL WAYS IN CASES ADDRESSING THE VESTING OF COLLECTIVELY BARGAINED RETIREE WELFARE BENEFITS 14

A. The Inter-Circuit Split Regarding What Presumption, If Any, Should Apply 14

B. The Difference Between How The Circuits Treat Collective Bargaining Cases Versus Pure ERISA Cases 17

C. The Impact Of "Shall Be Continued" Language 19

D. The Significance Of A Link Between Pension Benefits and Welfare Benefits 20

E. The Difference Among the Circuits Regarding Treatment of Durational Clauses That Follows the *Yard-Man* Split 20

F. The Need for Consistent Standards from This Court 22

II. THE DECISIONS BELOW ARE INCONSISTENT WITH DECISIONS OF THIS COURT 23

CONCLUSION 25

APPENDIX

Appendix A: Sixth Circuit Amended Memorandum Opinion, dated August 18, 2009 1a

Appendix B: District Court Order, dated March 17, 2008 ..... 4a

TABLE OF AUTHORITIES

CASES

Alday v. Raytheon Co.,
2008 U.S. Dist. LEXIS 62747 (D. AZ Aug. 5, 2008) 16

American Federation of Grain Millers v. International Multifoods Corp.,
116 F.3d 976 (2nd Cir. 1997) 16, 18

Anderson v. Alpha Portland Industries, Inc.,
836 F.2d 1512 (8th Cir. 1988) 16, 21

Bidlack v. Wheelabrator Corp.,
993 F.2d 603 (7th Cir. 1993) 16

Carriers Container Council, Inc. v. Mobile S.S. Ass'n., Inc. – International Longshoreman's Assoc.,
896 F.2d 1330 (11th Cir. 1990) 15, 21

Charles Dowd Box Co. v. Courtney,
368 U.S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483 (1962) 22

Chiles v. Ceridian Corp.,
95 F.3d 1505 (10th Cir. 1996) 18

Cole v. ArvinMeritor, Inc.,
515 F. Supp. 2d 791 (E.D. Mich. 2006) 19

Curtiss-Wright Corp. v. Schoonejongen,
514 U.S. 73, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995) 23

Gable v. Sweetheart Cup Co.,
35 F.3d 851 (4th Cir. 1994) 17

Joyce v. Curtiss-Wright Corp.,
171 F.3d 130 (2nd Cir. 1999) 20

Keffer v. H.K. Porter Co.,
872 F.2d 60 (4th Cir. 1989) 4, 15, 17

Litton Financial Printing Div. v. NLRB,
501 U.S. 190, 111 S. Ct. 2215, 115 L. Ed. 2d 177
(1991) 24

Maurer v. Joy Techs., Inc.,
212 F.3d 907 (6th Cir. 2000) 17

Moore v. Metropolitan Life Ins. Co.,
856 F.2d 488 (2d Cir. 1988) 24

Murphy v. Keystone Steel & Wire Co.,
61 F.3d 560 (7th Cir. 1995) 21

Nachman Corp. v. Pension Benefit Guar. Corp.,
446 U.S. 359, 100 S. Ct. 1732, 64 L. Ed. 2d 354,
358 (1980) 24

Nichols v. Alcatel USA Inc.,
532 F.3d 364 (5th Cir. 2008) 4, 16

Rossetto v. Pabst Brewing Co.,
217 F.3d 539 (7th Cir. 2000) 16, 18

Senior v. NStar Electric & Gas Corp.,
449 F.3d 206 (1st Cir. 2006) 15

Senn v. United Dominion Indus.,
951 F.2d 806 (7th Cir. 1992) 19

Sprague v. General Motors Corp.,
133 F.3d 388 (6th Cir. 1998) 17

Teamsters Local 174 v. Lucas Flour Co.,
369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593
(1962) 22

Tex. Life, Accident, Health & Hosp. Serv. Ins. Guar. Ass'n v. Gaylord Entm't Co.,
105 F.3d 210 (5th Cir 1997) 22

Trull v. Dayco Products, LLC,
No. 04-2109, No. 05-1591, 178 Fed. Appx. 247;
2006 U.S. App. LEXIS 10640 (4th Cir. April 28,
2006) 17

UAW v. Skinner Engine Co.,
188 F. 3d 130 (3rd Cir. 1999) ... 4, 16, 18, 19, 24

UAW v. Yard-Man,
716 F.2d 1476 (6th Cir. 1983), cert. denied, 465
U.S. 1007, 104 S. Ct. 1002, 79 L. Ed. 2d 234
(1984) ..... *passim*

United Steelworkers of America, AFL-CIO v. Textron, Inc.,
836 F.2d 6 (1st Cir. 1987) 4, 19

United Steelworkers of America, AFL-CIO-CLC v. Connors Steel Co.,
855 F.2d 1499 (11th Cir. 1988) 15, 21

Vallone v. CNA Fin. Corp.,
375 F.3d 623 (7th Cir. 2004) 20

Weimer v. Kurz-Kasch, Inc.,
773 F.2d 669 (6th Cir. 1985) 15

Wise v. El Paso Natural Gas Co.,
986 F.2d 929 (5th Cir. 1993) 25

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 185 1

29 U.S.C. § 1002(1) 25

29 U.S.C. § 1002(2)(A) 25

29 U.S.C. § 1132 . . . . . 1, 2

Volvo Construction Equipment North America, Inc., by its undersigned counsel, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The panel opinion and judgment of the United States Court of Appeals for the Sixth Circuit is reprinted in Petitioner's Appendix ("Pet. Apx.") at 1a-3a. The Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio denying Petitioner's motion for summary judgment and granting Respondents' motion for summary judgment is reported at 542 F. Supp.2d 751, and reproduced at Pet. App. 4a-43a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The district court had jurisdiction over this case pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, and Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132.

STATUTORY PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132, which provide in pertinent part:

29 U.S.C. Section 185 (LMRA). Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. Section 1132 (ERISA). Civil enforcement

(a) Persons empowered to bring a civil action
A civil action may be brought—

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary --

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan... .

STATEMENT OF THE CASE

I. INTRODUCTION

This case squarely presents an issue that has divided the circuit courts as to what standards should be applied by courts when determining whether collective bargaining agreements are to be interpreted as providing lifetime vested retiree welfare benefits.

One line of cases follow the Sixth Circuit's decision in *UAW v. Yard-Man,* 716 F.2d 1476 (6th Cir. 1983),which adopted an "inference," or presumption, in favor of lifetime vested retiree welfare benefits. Hand-in-hand with its *Yard-Man* inference, the Sixth Circuit also established several rules for cases presenting the issue of whether collectively bargained retiree welfare benefits are vested, including:

- The use of a different standard in cases regarding retiree welfare benefits that arise under a collective bargaining agreement instead of solely under an ERISA-covered plan;

- The interpretation of phrases such as "shall be continued" or "will continue" contained in collective bargaining agreements;

- The significance of provisions linking welfare benefits to pension benefits; and

- The treatment of durational clauses contained in collective bargaining agreements.

A few of the other circuit courts of appeals have adopted the Sixth Circuit's *Yard-Man* standards, either in whole or in part. See, for example, *United Steelworkers of America, AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 9 (1st Cir. 1987) (citing favorably to *Yard-Man* and finding that contract language stating that retiree medical benefits "shall be provided" is "consistent with a [] promise to pay retirees' insurance costs throughout their retirement, even after the particular collective bargaining agreement expires"); and *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) (holding that plaintiffs' benefits were intended to continue beyond expiration of a CBA and citing the the *Yard-Man* rationale that "'it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations'").

Other circuits, however, have rejected the *Yard-Man* inference and the principles stemming from that inference. See, for example, *UAW v. Skinner Engine Co.*, 188 F. 3d 130, 139-41 (3rd Cir. 1999) ("With respect to the Sixth Circuit's view that retiree benefits are 'status benefits' which carried with them an inference that they continue so long as the prerequisite status is maintained, we agree with ... the Eighth Circuit, which specifically rejected the notion"); and *Nichols v. Alcatel USA Inc.*, 532 F.3d 364, 378 (5th Cir. 2008) ("[the] inference, known as the Yard-Man inference ... has never been accepted by this court").

This case uniquely demonstrates both the presumptive effect of the *Yard-Man* inference, as well as the impact of several inter-circuit splits regarding whether the Sixth Circuit standards should be applied when determining whether retiree welfare benefits conferred in a collective bargaining agreement are vested beyond the expiration of that agreement.

II. FACTS

A. The Parties

Volvo Construction Equipment North America, Inc. ("VCENA") manufactures construction machinery equipment such as loaders, excavators and haulers. From 1984 until 1993, VCENA (through various predecessor companies) owned and operated a truck manufacturing plant operated in Euclid, Ohio (the "Euclid truck business").

Respondents are a class of plaintiffs consisting of hourly retirees (and/or the hourly retirees' spouses, surviving spouses and eligible dependents) who retired from the Euclid truck business prior to January 1, 1987. At the time Respondent retirees were active employees, they were represented by the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (the "UAW"), which is also a Respondent in this case.

Respondent retirees claim they are entitled to fully-funded, lifetime health and life insurance benefits based on a three-year collective bargaining agreement that was entered into in 1983 by Euclid, Inc., a subsidiary of Daimler Benz AG. In 1984, Euclid, Inc. sold the facility and its operations to Clark Michigan

Company. Thereafter, in 1986, Clark Michigan Company became part of VME Americas, Inc.

In 1993, VME Americas, Inc. entered into a joint venture with Hitachi Construction Manufacturing, Inc. pursuant to which VME and Hitachi formed a new entity, Euclid Hitachi Heavy Equipment, Inc. ("EHHE"), which, after a transfer of assets from VME, became the new owner of the Euclid truck business. In 1996, VME Americas, Inc. changed its name to VCENA, the name it retains today.

In connection with the transfer of the Euclid truck business to EHHE in 1993, EHHE agreed to "timely pay, perform and discharge the Euclid Division Liabilities," which liabilities included, "all debts, liabilities, obligations and claims relating to or in connection with the Employees, including, without limitation, all debts, liabilities, obligations and claims relating to employee benefit plans and arrangements now or previously existing or hereinafter in effect." (See the Record on Appeal before the 6th Circuit "ROA" 971-73, 975-76).

VCENA remained a shareholder of EHHE until HCM purchased VCENA's remaining interest in 2000. Since that time, VCENA has had no involvement in the Euclid truck business.

B. The 1983-1986 Collective Bargaining Agreement Which Forms The Basis For Respondents' Claims

On March 15, 1983, the UAW and Euclid, Inc. executed the 1983-1986 Collective Bargaining Agreement ("the CBA"), which incorporated

supplemental agreements including a pension plan, an insurance plan and an unemployment benefits plan. It is the Insurance Plan Supplement that describes the health care and life insurance benefits. In addition, the Insurance Plan Supplement provided that *the Supplement itself* terminated at the expiration of the CBA: "*This Agreement* and Program as modified and supplemented by this Agreement shall continue in effect *until the termination of the Collective Bargaining Agreement of which this is a part.*" (See VCENA's Appendix in the Court of Appeals "App. Apx." 218-219). (Emphasis added). Thus, a clear reading of the Insurance Plan Supplement is that the benefits provided for therein were to terminate when the CBA terminated, i.e., on March 14, 1986.

1. Retiree health insurance benefits

With respect to health benefits, the Insurance Plan Supplement provided that:

> The Company shall contribute the full premium or subscription charge for Health Care ... coverages continued in accordance with Article III, Section 5, for: (i) a retired employee (including any eligible dependents), provided such retired employee is eligible for benefits under Article II of The Euclid, Inc., Hourly-Rate Employees Pension Plan and (ii) an employee (including any eligible dependents) termination [sic] at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article

> II of The Euclid, Inc., Hourly-Rate Employees Pension Plan.

(App. Apx. 224).

The relevant portion of Article III, Section 5, referred to in the foregoing provision, stated that "Health Care Coverages [that] an employee has under this Article ... shall be continued thereafter *provided that suitable arrangements for such continuation can be made with the local plans, or insured plan.*" (App. Apx. 261). (Emphasis added).

2. Retiree life insurance benefits

The life insurance benefit created by the Insurance Plan Supplement was described in Article II, Section 3(b) of the Supplement.

For employees reaching age 65, the amount of life insurance was subject to reductions at various stages and under varying circumstances, but the benefit was not to be reduced to "less than $2500," for those employees with ten or more years of participation at age 65. Following the reductions, the "remaining Life Insurance will be continued thereafter until the death of the employee, *subject to the rights reserved to the Company to modify or discontinue this Plan.*" (App. Apx. 235). (Emphasis added).

With respect to employees who did not have ten years or more of participation as of age 65, there would be no life insurance benefit after separation from employment:

> If the employee has less than ten Years of Participation at age 65, such reductions shall be made until the earlier of 25 months of layoff, 12 months of leave of absence other than for disability, *or his separation from active service*, and *any amount remaining in force shall then be discontinued*.[1]

(Id., emphasis added).

C. Later Collective Bargaining Agreements

The UAW negotiated additional collective bargaining agreements with VME in 1986, 1989 and 1992, and with EHHE in 1995 and 1998. Each of those three-year agreements contained a provision stating that "[c]overage for retirees or spouses of retirees, who retired on or before December 31, 1986, will be at the level of benefits as set forth in the 1983 collective bargaining agreement." (ROA 493, 508-27). Once VME (now VCENA) transferred its assets and liabilities related to the Euclid truck business to EHHE in 1993, it no longer had standing or reason to bargain with the UAW over retiree benefits and, therefore, was powerless to bargain for the continuation, modification or termination of the retiree benefits. The 1995 and 1998 collective bargaining agreements that provided for the continuation of those benefits were, therefore, not agreements to which VCENA was a party.

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[1] The Agreement does go on to provide that if an employee attains ten years of participation after turning 65, the life insurance benefit will be calculated as if the employee had attained ten years at age 65. (App. Apx. 235)

D. Respondents' Settlement With EHHE and HCM

In January of 2005, EHHE announced that it had unilaterally decided to cease paying health care and life insurance benefits to Respondent retirees. When Respondents objected to EHHE's decision, EHHE, along with its parent company Hitachi Construction Manufacturing, Ltd. ("HCM"), negotiated a settlement with Respondents, set forth in a Retiree Benefit Agreement ("RBA"). (ROA 495). Under that settlement, HCM, on behalf of EHHE, paid Respondents a fraction of what their alleged vested welfare benefits were worth and sent Respondents in VCENA's direction to pursue any additional recovery for their alleged vested benefits. (ROA 550-56).

In other words, EHHE, with Respondents' acquiescence, shifted the alleged obligation for Respondents' retiree welfare benefits to VCENA over ten years after EHHE assumed that responsibility. As a consequence, VCENA has now been held liable for providing those lifetime health and life insurance benefits even though:

(1) VCENA was never a party to the 1983-1986 Agreement and never employed Respondents;

(2) VCENA was without authority or standing to bargain for the continuation, modification or cessation of the retiree welfare benefits in subsequent collective bargaining agreements by which Respondents' benefits were continued from 1995 forward; and

(3) VCENA transferred any and all liability for such benefits in 1993 and ceased any interest in the Euclid truck business years before EHHE terminated Respondents' retiree welfare benefits in 2005.

III. PROCEEDINGS BELOW

Respondents filed a Complaint against VCENA on February 1, 2005, seeking a permanent injunction requiring VCENA to provide them with fully-funded, lifetime health care and life insurance benefits pursuant to the 1983-1986 CBA. While the lawsuit was pending before the district court, Respondents continued to receive healthcare and life insurance benefits through a Voluntary Employee Benefits Association trust ("VEBA") that was established with the settlement funds paid by EHHE under the terms of the RBA.

The parties filed cross motions for summary judgment on August 24, 2006. On March 17, 2008, the district court denied VCENA's motion for summary judgment and granted Respondents' motion for summary judgment, ruling that VCENA was obligated under ERISA and the LMRA to maintain fully-funded health care insurance benefits for Respondents (including retirees, as well as the spouses, surviving spouses and eligible dependents of the retirees) and fully-funded life insurance benefits to the Respondent retirees for the duration of Respondents' lifetime.

The district court, following the *Yard-Man* rule, held that the phrase "shall be continued thereafter," as used in Article III, Section 5 of the Insurance Plan Supplement, evidenced an unambiguous intent to vest

lifetime retiree healthcare benefits as a matter of law. In so holding, the district court disregarded the phrase "provided that suitable arrangements for such continuation can be made...", which immediately followed the "shall be continued thereafter" language. (Pet. Apx. 25a-26a).

Similarly, relying on the *Yard-Man* line of cases, the district court stated that because some of the retirees' health care benefits were linked to pension eligibility, such a link could be a basis for granting summary judgment to the retirees. (Id. at 26a-27a). In response to VCENA's argument that not all retirees' benefits were tied to pension eligibility, the district court found that such a circumstance did not negate the evidence of intent to vest, but instead created an ambiguity that permitted the court to consider extrinsic evidence in a summary plan description ("SPD"). The SPD was a document summarizing what the benefit plans provided under the 1983-1986 CBA provided and how those benefit plans operated. In reviewing the SPD, the district court determined that, as a matter of law, the SPD would control in the event of a conflict between the SPD and the official plan documents. The district court then found that the SPD manifested an unambiguous intent to confer lifetime, vested health benefits. (Id. at29a-30a). No other extrinsic evidence was considered. (Id. at 30a).

The district court also considered the language of the durational clause set forth in the Insurance Program Supplement, which had been incorporated into the 1983-1986 CBA and which stated, "This Agreement and Program as modified and supplemented by this Agreement shall continue in effect *until the termination of the Collective Bargaining*

Agreement of which this is a part." (Id. at 31a). (Emphasis added). The district court held, as a matter of law, that such a clause was merely a "routine" or "general" durational clause that was insufficient to limit the health or life insurance benefits to the term of the CBA because the durational clause did not specifically refer to retiree health insurance or life insurance benefits. (Id. at 33a). Indeed, according to the district court, such durational language was not even sufficient to create an ambiguity regarding the duration of the retiree health or life insurance benefits and, thus, was insufficient to defeat Respondents' motion for summary judgment.

Finally, the district court reviewed the two reservation of rights clauses in the life insurance provisions within the Insurance Plan Supplement and found that they were insufficient as a matter of law to indicate an unambiguous intent against vesting or even to create an ambiguity whether life insurance benefits were intended to vest. (Id. 38a).

VCENA filed an appeal from the district court's order on April 14, 2008. On April 21, 2008, Respondents filed a Motion to Show Cause requesting that the district court order VCENA to immediately begin paying the full cost of Respondents' benefits at the levels provided under the 1983-1986 CBA. On August 18, 2008, the district court denied Respondents' Motion to Show Cause but ordered VCENA to begin paying 50% of the cost of Respondents' benefits. Since then, Respondents have continued to receive their benefits, which are paid for and administered by the VEBA. VCENA reimburses the VEBA for 50% of the cost of the benefits.

On August 18, 2009, the Court of Appeals for the Sixth Circuit affirmed the judgment of the district court "upon the reasoning employed in [the district court's] opinion dated March 17, 2008." (Pet. Apx. 3a).

VCENA filed a Motion for Stay of Mandate with the Sixth Circuit on September 8, 2009, which the court denied on September 15, 2009.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SPLIT SEVERAL WAYS IN CASES ADDRESSING THE VESTING OF COLLECTIVELY BARGAINED RETIREE WELFARE BENEFITS

The federal courts, as well as employers and retirees whose rights and responsibilities are determined by the federal courts, are in serious need of guidance from this Court regarding the determination of whether collectively-bargained-for retiree welfare benefits are vested for life. This need arises from a series of splits among the circuit courts of appeals surrounding this issue, particularly whether a presumption, or an inference, exists in favor of vesting and various rules of interpretation that flow from an inference in favor of vesting.

A. The Inter-Circuit Split Regarding What Presumption, If Any, Should Apply

The initial court of appeals decision on this issue was *UAW v. Yard-Man*, 716 F.2d.1476 (6th Cir. 1983), cert. denied, 465 U.S. 1007, 104 S. Ct. 1002, 79 L. Ed. 2d 234 (1984), which held that there is an "inference" that collectively bargained retiree welfare benefits are

vested because: (1) "it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations," and (2) "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained." 716 F.2d at 1482.

Other circuit courts of appeals have followed the *Yard-Man* standard. For example, in *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60, 64 (4th Cir. 1989), the Fourth Circuit favorably cited *Yard-Man* and stated :

> Surely the parties to the collective bargaining agreement realized that employees who are willing to forego current compensation in expectation of retiree benefits 'would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements.'

The Eleventh Circuit of Appeals has also followed *Yard-Man*. See *United Steelworkers of America, AFL-CIO-CLC v. Connors Steel Co.*, 855 F.2d 1499, 1504 (11th Cir. 1988) (citing *Yard-Man* and *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985) and stating that "[w]e fully concur with the decisions of the Court of Appeals for the Sixth Circuit in these two cases"); and *Carriers Container Council, Inc. v. Mobile S.S. Ass'n., Inc. – International Longshoreman's Assoc.*, 896 F.2d 1330, 1339 (11th Cir. 1990) (same).

Other circuit courts of appeals, however, have refused to adopt the inference or "presumption" that was adopted in *Yard-Man*. See, for example, *Senior v.*

NStar Electric & Gas Corp., 449 F.3d 206, 216-18 (1st Cir. 2006) ("[o]ur view is that in a claim for benefits based on a labor agreement under the LMRA federal labor law creates no presumption regarding vesting"); *American Federation of Grain Millers v. International Multifoods Corp.*, 116 F.3d 976, 980 (2nd Cir. 1997) (comparing the *Yard-Man* inference in favor of vesting with the presumption against vesting adopted by the Seventh Circuit in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993), and declining to apply either); *UAW v. Skinner Engine Co.*, 188 F. 3d 130, 139-41 (3rd Cir. 1999) (stating that it agreed with the Eighth Circuit's rejection of the Sixth Circuit's view that "retiree benefits are 'status benefits' which carr[y] with them an inference that they continue so long as the prerequisite status is maintained"); *Nichols v. Alcatel USA Inc.*, 532 F.3d 364, 378 (5th Cir. 2008) ("*Cole* relies on the inference that retiree benefits vest unless there is language in the CBA to the contrary ... This inference, known as the Yard-Man inference ... has never been accepted by this court"); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988) (specifically rejecting the *Yard-Man* presumption); *Alday v. Raytheon Co.*, 2008 U.S. Dist. LEXIS 62747 (D. AZ Aug. 5, 2008) (declining to adopt any presumption, based on *Yard-Man*, that health and welfare benefits are vested).

The Seventh Circuit, on the other hand, has taken a still different view by adopting a presumption *against* vesting. See *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543-44 (7th Cir. 2000) (stating that the Seventh Circuit presumes that an employee's entitlement to health benefits expires with the CBA creating the entitlement).

B. The Difference Between How The Circuits Treat Collective Bargaining Cases Versus Pure ERISA Cases

In addition to relying on an inference and presumption rule that is in conflict with the rule that exists in other circuits, the decision in the courts below also departs from other circuits in drawing a distinction between retiree benefits arising under collective bargaining agreements and those arising solely under ERISA plans.

In other words, both the Sixth Circuit and the Fourth Circuit have adopted different standards, depending on whether the retiree welfare benefits were unilaterally provided by the employer under an ERISA plan or were offered as a result of the collective bargaining process. *Cf. Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (requiring clear and express statement of vesting in purely ERISA cases) with *Yard-Man*, 716 F.2d 1476 (6th Cir. 1983) (inference of vesting in CBA context) and *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 915-16 (6th Cir. 2000) (not requiring express statement of vesting in CBA cases). See also *Trull v. Dayco Products*, LLC, No. 04-2109, No. 05-1591, 178 Fed. Appx. 247; 2006 U.S. App. LEXIS 10640, *4-6 (4th Cir. April 28, 2006) (explaining the difference between the holdings in *Keffer v. H.K Porter Co.*, 872 F.2d 60 (4th Cir. 1989), a CBA case, and *Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994), an ERISA-only case).

The Tenth Circuit has also suggested that it is appropriate to make distinctions and apply the *Yard-Man* inference when retiree welfare benefits are provided by a collective bargaining agreement, as

distinguished from an ERISA plan. See *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1514 (10th Cir. 1996) ("Yard-Man emphasized that the context in which benefits are written is important in making the inference; such an inference is more appropriate in the collective bargaining context where parties bargained over the language of retirement benefits").

The distinction that these circuit courts have made between collective bargaining cases and pure ERISA cases, however, is at odds with the Third and Seventh Circuits -- which specifically decline to recognize a distinction between the two types of cases -- as well as with the Second Circuit, which analyzes collective bargaining agreements and ERISA plans under the same standard. See *UAW v. Skinner*, 188 F.3d 130, 139 (3rd Cir. 1999) (stating that the cautionary principles that an employer's commitment to vest retiree welfare benefits is not to be inferred lightly and must be stated in clear and express language "apply without regard as to whether the .... welfare benefits are provided under a collective bargaining agreement, SPD [summary plan description], or other plan document; the same underlying considerations are present irrespective of the particular type of document at issue"); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 544 (7th Cir. 2000) ("The distinction between collective bargaining agreements and ERISA plans is not recognized in our cases, and we are not minded to embrace it now and make the law even more complicated than it is."); *American Fed'n of Grain Millers v. International Multifoods Corp.*, 116 F.3d 976, 979-80 (2nd Cir. 1997) ("We will examine [both] the CBAs and the ERISA plan documents in light of this [single] standard.").

C. The Impact Of "Shall Be Continued" Language

The courts below considered language from the 1983-1986 CBA stating that the retiree benefits "shall be continued thereafter" and, relying on the *Yard-Man* progeny of *Cole v. ArvinMeritor, Inc.*, 515 F. Supp. 2d 791, (E.D. Mich. 2006), aff'd 549 F.3d 1064 (6th Cir. 2008), concluded that such language evidenced an unambiguous intent to vest retiree benefits as a matter of law, despite the qualifying language that followed this phrase. (Pet. Apx. 24a-26a). The First Circuit has reached a similar finding. See *United Steelworkers of America, AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987) (affirming award of preliminary injunction to plaintiff based on finding that the language "shall be provided" and "Company shall pay" evidenced plaintiff's likelihood of success on claims that the employer must guarantee payment of health and life insurance premiums for retired workers' lives).

However, courts in other circuits that have expressly rejected the *Yard-Man* inference have also reached contrary conclusions about the meaning of such language. See *UAW v. Skinner Engine Co.*, 188 F.3d 130, 141 (3rd Cir. 1999) ("A plain reading of the phrases, 'will continue' and 'shall remain,' certainly does not unambiguously indicate that the benefits will continue ad infinitum ..."); *Senn v. United Dominion Indus.*, 951 F.2d 806, 816 (7th Cir. 1992) ("it requires more than a statement in a CBA that welfare benefits 'will continue' to create an ambiguity about vesting, for the logical interpretation under our rule is that benefits 'will continue' for the duration of the contract.").

D. The Significance Of A Link Between Pension Benefits and Welfare Benefits

In this case, the courts below found it significant that the CBA contained language linking the Respondents' health care benefits to pension eligibility (Pet. Apx. 26a-30a); yet, other circuit courts of appeal have reached the opposite conclusion. See, for example, *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2nd Cir. 1999) ("We are unpersuaded by [plaintiffs'] attempt to manufacture ambiguity by statements such as 'the [Group Insurance Agreements] state that insurance will be provided for employees receiving or becoming entitled to receive pension payments'..."); and *Vallone v. CNA Fin. Corp.* 375 F.3d 623, 633 n.4 (7th Cir. 2004) (noting that "the packaging of a welfare benefit with pension benefits does not on its own alter our presumption against vesting in the absence of express language to the contrary").

E. The Difference Among the Circuits Regarding Treatment of Durational Clauses That Follows the *Yard-Man* Split

This case also evidences the split in the circuits over the interpretation of durational clauses in collective bargaining agreements. In this case, the durational clause in the Insurance Plan Supplement limited the duration of the Programs to the term of the CBA: "This [Insurance] Agreement and [Insurance] Program as modified and supplemented by the [Insurance] Agreement shall continue in effect until the termination of the Collective Bargaining Agreement of which this is a part." However, relying on *Yard-Man*, 716 F.2d at 1482, the courts below held that when such durational clauses do not refer

specifically to retiree health or life insurance benefits they are only "general" durational clauses, and such "general" clauses not only fail to establish an unambiguous intent to limit the retiree health and life insurance benefits to the life of the CBA, but also fail to even create an ambiguity on the issue of vesting sufficient to defeat summary judgment. (Pet.Apx. at 33a).

The Eleventh Circuit has concurred with this view. See, for example, *United Steelworkers of America, AFL-CIO-CLC v. Connors Steel Co.*, 855 F.2d 1499, 1504 (11th Cir. 1988), and *Carriers Container Council, Inc.*, 896 F.2d 1330, 1339 (11th Cir. 1990), wherein the Eleventh Circuit concurred with the *Yard-Man* holding that general duration clauses in a collective bargaining agreement do not "imply a cutoff date for other clauses of the agreement that have no durational language." (Id. at 1339).

In the Seventh and Eighth Circuits, however, such "general" durational language is held to limit the duration of retiree benefits to the life of the CBA. See *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 567 (7th Cir. 1995) (holding that language stating that the health plan will be not terminated or amended during the term of the collective bargaining agreement meant that the plan could be terminated or amended after expiration of the CBA); and *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512,1519 (8th Cir. 1988) (stating "[i]t would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date" and rejecting the argument that benefits were non-terminable because the word "terminate" did not appear in the agreement).

F. The Need for Consistent Standards from This Court

Only this Court is positioned to resolve these several conflicts among the circuits. Indeed, it is "one of the traditional functions of this Court" to "resolve and accommodate" the "diversities and conflicts" that may occur among the courts of the federal circuits. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 514, 82 S. Ct. 519, 7 L. Ed. 2d 483 (1962).

Petitioner submits that it is imperative that the Court performs this function with respect to the several conflicts discussed here in order to preserve the federal labor policy embodied in Section 301. As the Court has stated, Section 301 is peculiarly one that calls for uniform law." *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962). The concern expressed by this Court in *Lucas Flour Co.*, that the "possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements," exists just as much when individual contract terms have different meanings under the law of the different federal circuit courts. Id. at 103-104.

Likewise, ERISA's intent to create uniformity is undermined by the inconsistencies among the circuit courts of appeals described here. See *Tex. Life, Accident, Health & Hosp. Serv. Ins. Guar. Ass'n v. Gaylord Entm't Co.*, 105 F.3d 210, 217 (5th Cir 1997) ("ERISA's pre-emption provisions are designed to protect plan participants by eliminating the threat of inconsistent state and local regulation of employee

benefit plans and establishing a uniform standard to govern employee benefit plans as an exclusive federal concern").

Unless and until this Court addresses the issues discussed here, the splits among the circuits will continue, and both employers and retirees will continue to be exposed to the resulting uncertainty.

II. THE DECISIONS BELOW ARE INCONSISTENT WITH DECISIONS OF THIS COURT

The lower courts' decision in this case, as well as the Sixth Circuit precedent on which they relied, not only conflicts with the law of other circuits, it is also inconsistent with decisions of this Court. In *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995), this Court recognized that "ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." The rationale underlying Congress' decision to carve out welfare benefits from the mandatory vesting provisions applicable to pension benefits under ERISA has been explained by the Second Circuit as follows:

> With regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating

> and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs.

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988).

In addition, in *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 207, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991), this Court stated that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement."

The Sixth Circuit's *Yard-Man* "inference" is at odds with both of these legal principles. See *UAW v. Skinner*, 188 F.3d at 141 (3rd Cir.) ("the *Yard-Man* inference may be contrary to Congress' intent in choosing specifically not to provide for the vesting of employee welfare benefits").

Moreover, ERISA was enacted in 1974, at which time Congress conspicuously chose to exempt welfare benefit plans from the full breadth of ERISA's extensive requirements, including ERISA's vesting requirements. See *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361, 100 S. Ct. 1732, 1726, 64 L. Ed. 2d 354, 358 (1980) ("[o]n September 2, 1974, following almost a decade of studying the Nation's private pension plans, Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA)");

and *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993) (comparing the definition of "employee pension benefit plans" under 29 U.S.C. § 1002(2)(A) with the definition of "employee welfare benefit plans" under § 1002(1)).

Thus, the understanding at the time the 1983-1986 CBA was negotiated was that welfare benefit plans differed from pension plans and were exempt from ERISA's vesting requirements. The *Yard-Man* inference, however, was not established until September 9, 1983 -- months after the 1983-1986 CBA was executed. When VCENA's predecessor finalized the CBA with Respondents in March of 1983, it could not have anticipated that the language of the CBA, which does not refer to either "lifetime" or "vested" benefits, would nevertheless be construed to provide lifetime, vested welfare benefits based on a judicially-created presumption that did not yet exist.

CONCLUSION

There exists a deep-rooted split among the circuit courts regarding what standard the federal courts are to apply when determining whether a collective bargaining agreement should be interpreted as providing lifetime vested retiree welfare benefits. This inter-circuit split is inconsistent with the concept of a uniform federal labor law under Section 301. Likewise, there is a strain between Congress' intent to exempt welfare benefits from ERISA's mandatory vesting requirements and the presumptive effect of the *Yard-Man* standards. For these reasons, as well as the other reasons set forth herein, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 08-3508

[Filed August 18, 2009]

ISAAC ROSE, et al.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
VOLVO CONSTRUCTION EQUIPMENT NORTH AMERICA, INC.,	)
	)
Defendant-Appellant.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

AMENDED MEMORANDUM OPINION*

* This amended memorandum opinion corrects a clerical error in the memorandum opinion filed on August 11, 2009, simply

BEFORE: GILMAN and McKEAGUE, Circuit Judges; and SARGUS, District Judge.[**]

PER CURIAM. Defendant-appellant Volvo Construction Equipment North America, Inc. appeals from the March 17, 2008 summary judgment order of the district court, enjoining Volvo to continue providing fully-funded life insurance benefits to plaintiffs-appellees Isaac Rose and a certified class of similarly situated retirees, and to continue providing fully-funded health care insurance benefits to the class member retirees and eligible spouses and dependents.

Having had the benefit of oral argument and having carefully considered the record on appeal, the arguments advanced by the parties in their briefs, and the applicable law, we are not persuaded that the district court erred in awarding summary judgment to the plaintiff class members. In our opinion, Volvo's core arguments are satisfactorily and properly answered within the four corners of the district court's ruling. Insofar as Volvo now asserts arguments not first addressed to the district court, they are not properly before us and, in any event, are insufficient on their merits to undermine the integrity of the district court's analysis. Because we conclude that the reasoning which supports award of judgment to the plaintiff class members has been correctly articulated

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substituting the term "health care insurance benefits" for "life insurance benefits" in the fourth and fifth lines of the first paragraph.

[**] Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

by the district court, issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose.

Accordingly, the judgment of the district court is, upon the reasoning employed in its opinion dated March 17, 2008, hereby **AFFIRMED.**

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:05 CV 168
JUDGE SOLOMON OLIVER, JR.

[Filed March 17, 2008]

ISAAC ROSE, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
VOLVO CONSTRUCTION EQUIPMENT NORTH AMERICA, INC.,	)
	)
Defendant.	)

ORDER

On February 1, 2005, Plaintiffs Isaac Rose, Peggy Knox, Joseph Henderson, Wilbert Whitt, Opal Whitt, Andrew Bergant, Jr., A.C. Wade, and Metro Burtyk, on behalf of themselves and all others similarly situated, along with International Union, and the United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") (together, "Plaintiffs") filed the above-captioned action against Defendant

Volvo Construction Equipment North America, Inc. ("Defendant" or "VCENA"). After Plaintiffs amended their Complaint by withdrawing all individual claims for monetary damages (*see* Third Amended Compl. ("TAC"), ECF No. 138), the court certified the instant suit as a class action for declaratory and injunctive relief. (Order, ECF No. 175.) VCENA filed third-party claims against Euclid-Hitachi Heavy Equipment, Inc. ("EHHE"), Hitachi Construction Machinery ("HCM"), Hitachi Construction Manufacturing Ltd. ("HTM"), and Deere-Hitachi Construction Machinery Corp. ("Deere-Hitachi") for declaratory judgment and damages. Upon separate motions from each of the Defendants, the court stayed the third-party claims pending arbitration. (ECF No. 174.)

Plaintiffs comprise a class of hourly-paid retirees and spouses, surviving spouses, and dependents of retirees. Plaintiffs allege that VCENA violated Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and Section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132. Specifically, Plaintiffs allege that VCENA breached the parties' Collective Bargaining Agreement ("CBA") to provide lifetime, fully-funded health care insurance benefits to the retirees, spouses, surviving spouses, and eligible dependents of retirees as well as lifetime, fully-funded life insurance benefits to retirees. Plaintiffs seek declaratory judgment and injunctive relief.

Now pending before the court are Plaintiffs' Motion for Summary Judgment (ECF No. 155), Defendant's Motion for Summary Judgment (ECF No. 156); Plaintiffs' Motion for Preliminary Injunction (ECF No. 182), and Defendant's Motion for Order Striking

Plaintiffs' Affidavits or, in the Alternative, for Leave to Depose Affiants and Leave to File Surreply ("Motion to Strike") (ECF No. 195). For the reasons set forth below, Plaintiffs' Motion for Summary Judgment (ECF No. 155) is granted, Defendant's Motion for Summary Judgment (ECF No. 156) is denied, Plaintiffs' Motion for Preliminary Injunction (ECF No. 182) is denied as moot, and Defendant's Motion to Strike (ECF No. 195) is denied as moot.

I. FACTS AND PROCEDURAL HISTORY

The court has already set out the general factual background of the within case in a previous Order dated March 21, 2007. That Order states, in relevant part:

> Plaintiffs maintain that VCENA and/or various other corporate entities operated facilities in Euclid, Ohio, involved with heavy truck manufacturing, engineering, and testing (the "Euclid Facility"). The individual Plaintiffs allege they are retirees, retiree spouses, surviving spouses or dependants of retirees from the Euclid Facility, who retired prior to January 1, 1987. While the Plaintiff retirees were employed at the Euclid Facility, the UAW and UAW Local 70, or its predecessor UAW Local 426 (collectively, the "Union"), served as their exclusive bargaining representative.
>
> In 1984, Defendant VCENA, operating under the name of Clark Michigan Company ("Clark"), purchased the assets of the Euclid Facility, involved with heavy truck manufacturing, engineering, and testing. In 1994, Defendant

VCENA, then operating under the name of "VME Americas Inc." ("VME"), entered into a joint venture agreement with Hitachi Construction Machinery ("HCM") to create Euclid-Hitachi Heavy Equipment, Inc. ("EHHE") and EHHE's wholly-owned Canadian subsidiary, Hitachi Construction Manufacturing Ltd. ("HTM"). EHHE was to operate the Euclid Facility. Between 1994 and 2000, VCENA transferred its interest in EHHE to HCM, until EHHE became a wholly-owned subsidiary of HCM in 2000. Sometime after 2001, the Euclid Facility was controlled by HTM, which operated the facility through one of its branches or divisions called the Euclid-Hitachi Technical Center ("EHTC").

While operating under the name of Clark, Plaintiffs allege that VCENA was bound by a collective bargaining agreement with the Union, effective [from] 1983 to 1986 (the "1983 CBA"). (*See* Third Amended Complaint ("TAC"), [] ECF No. 138.) The 1983 CBA allegedly contained a section entitled, "Pension Plan, Insurance Program and Supplemental Unemployment Benefit Plan," which stated that the terms of the healthcare and life insurance benefits were contained in a series of Supplemental Agreements. [*See* 1983 CBA at 144, ECF No.144.] [According to Plaintiffs,] [t]he Supplemental Agreements provided for an insurance program that guaranteed retirees and their spouses, surviving spouses, and eligible dependents fully paid healthcare benefits for life. [*See* Supplemental Agreements, at 22-24-B, 96-B, and 97-98-B, ECF No. 145.) Plaintiffs also

> contend that the insurance program set forth in the Supplemental Agreements also guaranteed retirees fully paid life insurance benefits for life. (*See id.* at Art. II, 28-84-B.)] Plaintiffs maintain that all subsequent collective bargaining agreements with HTM and its predecessors, including VCENA operating as Clark and VME, guaranteed retirees, their spouses and dependents the same coverage that they received under the 1983 CBA.
>
> In a letter dated January 12, 2005, all retirees and their spouses, surviving spouses, and dependents were informed that their benefits would be cancelled as of February 28, 2005. (*See* TAC, Ex. 9 (January 12, 2005 Form Letter).) The letter stated that EHHE was going out of business and the current retiree life and healthcare benefits would terminate on February 28, 2005. (*Id.*) Plaintiffs allege that VCENA was obligated to provide them with "vested lifetime retiree health care and life insurance benefits" and that VCENA has breached this obligation. (*See* TAC ¶¶ 64-66.)

(Order, ECF No. 175, at 2-4.)

On February 9, 2005, the UAW and EHHE and HCM executed a Retiree Benefit Agreement ("RBA"), under which EHHE, VCENA's successor, and HCM agreed to continue funding the same health care and life insurance benefits to hourly-paid retirees and their dependents through March 31, 2005, and thereafter to contribute funds through an independent Voluntary Employees' Beneficiary Association ("VEBA"), which was established under Section 501(c)(9) of the Internal

Revenue Code. (TAC ¶¶ 42-45.) According to Plaintiffs, the VEBA trust was intended to settle Plaintiffs' claims against the participating entities and to provide temporary benefits to Plaintiffs pending resolution of the instant lawsuit, which seeks lifetime benefits, with VCENA. According to Defendant, Plaintiffs released VCENA from liability through Plaintiffs' settlement agreement with EHHE. On August 24, 2006, both parties moved for summary judgment, arguing that the parties' intention to vest (in Plaintiffs' view) or not vest (in Defendant's view) lifetime, fully-funded benefits is clear from the unambiguous language of the CBA or, alternatively, through extrinsic evidence.

On August 3, 2007, Plaintiffs filed a Motion for Preliminary Injunction (ECF No. 182), seeking temporary relief against VCENA, on the ground that the trustees to the VEBA trust had reduced Plaintiffs' insurance benefits in order to extend the life of the trust due to VCENA's failure to pay lifetime benefits. Defendant then filed a Motion to Strike (ECF No. 195) the affidavits that Plaintiffs submitted with their Reply in Support of Motion for Preliminary Injunction.

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

In reviewing summary judgment motions, this court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252. However, "[c]redibility judgments and weighing of the evidence are prohibited during the consideration of a motion for summary judgment." *Ahlers v. Scheibil*, 188 F.3d 365, 369 (6th Cir. 1999).

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1938)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established that create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show "more

than a scintilla of evidence to overcome summary judgment"; it is not enough to show that there is slight doubt as to material facts. *Id.*

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e).

III. LAW AND ANALYSIS

Because a finding that Plaintiffs' have released VCENA from liability would preclude Plaintiffs from pursuing their claims against VCENA for insurance benefits, the court will address this issue first.

A. Whether Plaintiffs' Settlement with EHHE Discharged VCENA

Defendant argues that Plaintiffs' settlement with EHHE through the RBA effectively discharged VCENA because: (1) the settlement did not expressly preserve VCENA's recourse against EHHE; and (2) the settlement increased VCENA's risk of loss and decreased VCENA's ability to shift the cost of liability to EHHE. In response, Plaintiffs argue that: (1) ERISA and federal labor law preempt Defendant's state surety law arguments herein; and (2) the settlement agreement fulfills all requirements for Plaintiffs to retain their claims against VCENA. As discussed

below, the court finds that the settlement did not discharge VCENA.

The court will accept several of Defendant's assertions without discussion, despite Plaintiffs' arguments to the contrary, because the court finds that they are not dispositive. Accordingly, the court will assume that state surety law is not preempted by ERISA and therefore applies to the instant case. The court will also assume that EHHE is the primary obligor of the disputed retiree benefits, and that VCENA constitutes EHHE's surety, or secondary obligor. Even so, the court finds Defendant's argument that Plaintiffs' settlement with EHHE released VCENA is not well-taken.

Defendant argues that under *Gholson v. Savin*, 137 Ohio St. 551, 560 (Ohio 1941), the terms of a settlement agreement must "reserve not only the creditor's right against the surety, but the surety's right against the principal as well." Defendant also quotes Section 39 of the Third Restatement of Suretyship & Guaranty ("Restatement") for this proposition. The Restatement provides, in pertinent part:

> To the extent that the obligee releases the principal obligor from its duties pursuant to the underlying obligation:
>
> . . . .
>
> (b) the secondary obligor is discharged from any unperformed duties pursuant to the secondary obligation unless:
>
> (i) the terms of the release effect a preservation of the secondary obligor's recourse . . . ; or

> (ii) the language or circumstances of the release otherwise show the obligee's intent to retain its claim against the secondary obligor . . . .

Id. Upon examining the instant RBA and the New Participation Agreement ("NPA"), in which the individual workers joined the settlement agreement, the court finds that these documents satisfy the requirements of both *Gholson* and the Restatement that the settlement agreement must indicate that the secondary obligor's recourse against the principal obligor is preserved.

The RBA settlement was signed on February 9, 2005. It reads, in relevant part:

> 11. **Union's Covenant Not to Sue:** The Union and UAW Local 70 agree that neither they nor their officers or employees will bring any grievance, arbitration, lawsuit, or other claim (or materially assist anyone else to do so, except as required by law) against EHHE or its parent HCM, either's affiliates, any of their officers, employees, agents or benefit plans, or any of their predecessors, with respect to the reduction or elimination of retiree health or welfare benefits other than to enforce this Agreement. They further agree to use their best efforts to discourage any of their affiliates from doing any of the foregoing. The preceding sentences shall not bar the Union, any of its locals, or any of their officers or employees from bringing any grievance, arbitration, lawsuit, or other claim against Volvo or any of its predecessors, or their officers or employees.

(RBA ¶ 11, ECF No. 156-7, at 3.) In addition, the Appendix to the RBA includes an example of an NPA, which the parties do not dispute that each Plaintiff signed. The NPA provides, in pertinent part:

> In exchange for the benefits Euclid-Hitachi Heavy Equipment, Inc. (Euclid) has offered to provide me, as set forth in paragraph (b), I agree as follows:
>
> (a) **Background:** . . . . Except to the extent Euclid is legally obligated to continue to [sic] such benefits, I acknowledge that no Released Party has to provide them. The Released Parties are Euclid, Hitachi Construction Machinery Co., Ltd. (HCM), Hitachi Construction Truck Manufacturing Ltd[.] (HTM), and their affiliates, and their predecessors *(other than any Volvo company or affiliate, including [VCENA], and their predecessors and affiliates)* and each such entity's current and former shareholders, directors, officers, employees, insurers, benefit programs, and all other related parties. . . . .
>
> . . . .
>
> (c) **Waiver of Claim to Prior Coverages:** In exchange for the substitute benefits described in paragraph (b), on behalf of myself and all members of my family and all of our successors, assignees, heirs, and legatees, I waive any known or unknown claims of any type I or they might have to any other life, health, or similar benefits, or anything in lieu of them, against every Released Party. I promise never to assert any such claim. I assign to HCM anything my family or I would otherwise receive as a result of anyone pursuing such a claim on my or their

> behalf. *The preceding sentence shall not apply to amounts any Released Party must pay to or for any Volvo company pursuant to an indemnification or similar agreement. . . . .*

(NPA, RBA Appendix, ECF No. 165-7, at 6) (emphasis added.)

While the language could have been written more clearly, the NPA refers to "amounts any Released Party must pay to or for any Volvo company pursuant to an indemnification or similar agreement." (NPA at (c).) This statement indicates that EHHE and all Plaintiffs acknowledged Volvo, or VCENA's, right to seek indemnification against "any Released Party."

Furthermore, the "circumstances of the release" also demonstrate that Plaintiffs intended to pursue claims against VCENA, thus satisfying Section 39(b)(2) of the Restatement. In a letter dated December 17, 2004 (nearly two months before the RBA was executed), VCENA informed EHHE and HCM that it was aware of their negotiations with Plaintiffs and that

> if the Hitachi entities [EHHE and HCM] do not intend to satisfy [their obligations to VCENA] in full, please consider this to be notice under the indemnity provisions of the various agreements between Volvo entities and Hitachi entities that Volvo intends to pursue its rights to indemnity under these agreements to the fullest extent possible.

(ECF No. 160-6.) In addition, Plaintiffs filed the instant suit against VCENA eight days prior to the

execution of the RBA. Therefore, at the time the RBA was signed, all parties knew that Plaintiffs were pursuing claims against VCENA and that VCENA had stated its intention to seek indemnification from EHHE and HCM.

The court similarly rejects Defendant's argument that the settlement "increased VCENA's risk of loss, as well as jeopardized VCENA's ability to effectively subrogate against EHHE and/or HCM and shift the loss to them." (Def.'s Mot. Summ. J. at 18); *see* Restatement § 37. Defendant contends that:

> [P]laintiffs, EHHE, and HCM each intended the RBA to serve as a vehicle to shift all remaining retiree health expenses from EHHE and HCM to VCENA, and to facilitate the flight of EHHE and HCM from the reach of U.S. courts, thus making it far more difficult (if not impossible) for VCENA to invoke its contractual and common law indemnification and subrogation rights against EHHE and HCM, and forcing VCENA as surety to bear the entire loss.

(Def.'s Mot. Summ. J. at 18-19.) However, both EHHE and HCM remain third-party Defendants in the within case and, as Plaintiffs state, neither EHHE nor HCM have withdrawn their argument that this court lacks jurisdiction over them. (*See* ECF No. 108.) Consequently, the court finds that VCENA retains the ability to seek indemnification from EHHE and HCM. Therefore, the settlement did not release VCENA. As a result, Plaintiffs retain the right to pursue their claims against VCENA.

The court next examines whether the parties intended to vest lifetime, fully-funded life insurance and health care benefits for Plaintiffs.

B. Analytical Framework and "the *Yard-Man* Inference"

The Sixth Circuit laid out the general principles controlling retiree benefit plans in *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 578 (6th Cir. 2006).

> A retiree health care insurance benefit plan is a welfare benefit plan under ERISA. *Maurer v. Joy Techs.*, Inc., 212 F.3d 907, 914 (6th Cir. 2000) (citing *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (6th Cir. 1993)). Unlike pension plans, "there is no statutory right to lifetime health benefits." *Golden*, 73 F.3d at 653. If lifetime health care benefits exist for the plaintiffs, it is because the UAW and the defendants agreed to vest a welfare benefit plan. *Id.* at 654; *see also Boyer*, 986 F.2d at 1005. If a welfare benefit has not vested, "after a CBA expires, an employer generally is free to modify or terminate any retiree medical benefits that the employer provided pursuant to that CBA." *Bittinger v. Tecumseh Prod. Co.*, 83 F. Supp. 2d 851, 857 (E.D. Mich. 1998) (quoting *Am. Fed'n of Grain Millers v. Int'l Multifoods*, 116 F.3d 976, 979 (2d Cir. 1997)). If a welfare benefit has vested, the employer's unilateral modification or reduction of those benefits constitutes a LMRA violation. *Maurer*, 212 F.3d at 914.

(footnote omitted).

In the seminal case of *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), the Sixth Circuit established the analytical framework for determining whether parties intended benefits to "continue beyond the expiration of the collective bargaining agreement." First, the court noted that, "[a]ny such surviving benefit must necessarily find its genesis in the collective bargaining agreement. . . . [T]he court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent." *Id.* The court then noted the importance of context, stating:

> The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion. The court should also interpret each provision in question as part of the integrated whole. If possible, each provision should be construed consistently with the entire document and the relative positions and purposes of the parties. As in all contracts, the collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises.

Id. at 1479-80 (citations omitted). Where the CBA's language is ambiguous, *Yard-Man* held that "the court may look to other words and phrases in the collective bargaining agreement for guidance. Variations in language used in other durational provisions of the agreement may, for example, provide inferences of intent useful in clarifying a provision whose intended duration is ambiguous." *Id.* at 1480 (citations omitted). Finally, the court stated that its interpretation of a

CBA should not "denigrate or contradict basic principles of federal labor law." *Id.* (citations omitted).

Following the framework set forth in *Yard-Man*, and consistent with general principles of contract interpretation, the court will first look to the language of the CBA itself. Only if the court finds that language to be ambiguous will the court then look to extrinsic evidence to determine the parties' intent.

The parties dispute the significance of certain language in the *Yard-Man* opinion that has become known as "the *Yard-Man* inference." The language, as well as its surrounding context, reads as follows:

> [R]etiree benefits are in a sense "status" benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree. This is not to say that retiree insurance benefits are necessarily interminable by their nature. Nor does any federal labor policy identified to this Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits. In the present case,

> however, this contextual factor buttresses the already sufficient evidence of such intent in the language of this agreement itself.

716 F.2d at 1482 (citations omitted and emphasis added). The *Yolton* court clarified the scope of the often-debated *Yard-Man* inference in the following statement:

> Under *Yard-Man* we may infer an intent to vest from the context and already sufficient evidence of such intent. Absent such other evidence, we do not start our analysis presuming anything. . . . [U]nder *Yard-Man*, "there is no legal presumption that benefits vest and that the burden of proof rests on plaintiffs." *Maurer*, [212 F.3d 907, 917 (6th Cir. 2000)]. This Court has never inferred an intent to vest benefits in the absence of either explicit contractual language or extrinsic evidence indicating such an intent. Rather, the inference functions more to provide a contextual understanding about the nature of labor-management negotiations over retirement benefits. That is, because retirement health care benefits are not mandatory or required to be included in an agreement, and because they are "typically understood as a form of delayed compensation or reward for past services" it is unlikely that they would be "left to the contingencies of future negotiations." *Yard-Man*, 716 F.2d at 1481-82 (citations omitted). When other contextual factors so indicate, *Yard-Man* simply provides another inference of intent. All that *Yard-Man* and subsequent cases instruct is that the Court

> should apply ordinary principles of contract interpretation.

Id. at 579-580 (6th Cir. 2006). Thus, the court will follow the analytical framework outlined in *Yard-Man*, as clarified by *Yolton*.

C. Language of the CBA

The CBA in the instant case stated that it became effective on March 15, 1983, and would "continue in full force and effect without change until . . . March 14, 1986." (1983 CBA ¶ 180, at 143.) The CBA contained a section titled, "Pension Plan, Insurance Program and Supplemental Unemployment Benefit Plan," which stated as follows:

> The parties have provided for a Pension Plan, an Insurance Program and Supplemental Unemployment Benefit Plan by Supplemental Agreements signed by the parties simultaneously with the execution of this Agreement, which Supplemental Agreements are attached hereto as Exhibit "A", Exhibit "B" and Exhibit "C" respectively and made parts of this Agreement as if set out in full herein, subject to all provisions of this Agreement.

(*Id.* ¶ 181, at 144.)

Plaintiffs' argue that the CBA unambiguously provided for lifetime, fully-funded benefits because a provision stated that health care coverage "shall be continued thereafter"; some health care benefits were tied to pension eligibility; the CBA did not reserve the right to unilaterally terminate life insurance benefits;

extrinsic evidence in the Summary Plan Description ("SPD") demonstrates an intent to vest lifetime benefits; and the duration clause that appears in the Supplemental Agreement is "general" and thus does not terminate benefits on the date the CBA terminated. In response, Defendant argues that the CBA unambiguously did *not* provide lifetime, fully-funded benefits because the continuation of health care benefits is subject to a satisfaction clause; not all health benefits are tied to pension eligibility; the CBA reserved the employer's right to unilaterally modify or discontinue life insurance benefits; the SPD is not valid; and the duration clause specifically terminates benefits when the CBA terminates. The court will analyze health care and life insurance benefits separately.

D. Health Care Benefits for Retirees, Spouses, Surviving Spouses, and Eligible Dependents

1. The Effect of the Phrase "Shall Be Continued Thereafter Provided That"

The Section of the Insurance Program Agreement titled, "Continuance of Health Care (Other than Vision) Coverages Upon Retirement or Termination of Employment at Age 65 or Older" reads, in relevant part:

> Health Care Coverages[] an employee has under this Article at the time of retirement or termination of employment at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of The Euclid, Inc., Hourly Rate Employees Pension Plan *shall be*

> *continued thereafter* provided that suitable arrangements for such continuation can be made with the local plans, or insured plan. Contributions for coverages *so continued* shall be in accordance with Article I, Section 3(b)(7).[1]

(Art. III, Section 5(a), Insurance Program Agreement, at 96-B) (emphasis added.) Plaintiffs argue that the language states that coverage "shall be continued" after an employee retires or is terminated, which indicates that health care benefits were intended to continue after the CBA terminated.

Defendant argues that the phrase "provided that" constitutes a condition, or satisfaction clause, which limits the continuation of benefits because it allows the employer to cease paying the coverage if suitable arrangements cannot be made,[2] thereby demonstrating

---

[1] Article I, Section 3(b)(7) in turn provides that "[t]he Company shall contribute . . . [health care] coverages continued in accordance with Art. III, Section 5" for pension-eligible retirees as well as employees who were terminated at age 65 but were not eligible for the pension plan.

[2] In its Reply Brief, Defendant contends that "it is undisputed that, at present, 'suitable arrangements' cannot in fact be made for the health care plan's continuation, because the plan presently cannot obtain stop loss insurance coverage. (Trent Dep. 96.)" (Def.'s Reply Br. 8, ECF No. 164.) The evidence that Defendant cites is a deposition from Michelle Trent ("Trent"), who is a human resources employee for EHHE, HCM, and HTM. She states simply that no stop-loss insurance is provided. (Trent Dep. 96, ECF No. 168.) The court finds that Defendant did not raise the impossibility of performance as a defense. (VCENA Answer to TAC, ECF No. 151.) In any event, this evidence is insufficient to create a genuine issue of material fact regarding whether Defendant was unable to find suitable arrangements.

that health care benefits were not meant to be vested for life. Plaintiffs contend that "provided that" is not a condition, but is instead an "impossibility of performance" clause that simply means that Defendant "would only be released from its obligation if companies stopped selling health insurance in Ohio [thus meaning that suitable arrangements could not be made with a local or insured plan], a fact not even alleged." (Pls.' Reply Br. at 7.)

Without ruling on whether "provides that" constitutes an impossibility clause, the court agrees with Plaintiffs that the "shall be continued thereafter" phrase indicates an intent to vest lifetime health care benefits. In *Cole v. ArvinMeritor*, No. 03-73872, 2006 U.S. Dist. LEXIS 61003 (E.D. Mich. Aug. 17, 2003), the court examined a similar clause and found that the benefits were intended to vest for life. The court stated:

> Section 5(a) addresses, among other things, "continuance" of health care coverages for pension-eligible retirees. It provides, in pertinent part:
>
> > The Health Care ... Coverages an employee has under this Article at the time of retirement ... shall be continued thereafter provided that suitable arrangements for continuation can be made with the Carrier(s). Contributions for coverages so continued shall be in accordance with Article I, Section 3(b)(6).
>
> (Ex. 114, Exhibit "B-1" at 72)

> This language, tying pension status to retiree health benefits – and providing that the health benefits "at the time of retirement ... shall be continued thereafter" for retirees and "any eligible dependents" – constitutes an enforceable contractual promise of lifetime retiree health benefits to accompany lifetime pension benefits.

Thus, the *ArvinMeritor* court implicitly discredited the "provided that" phrase and relied on the "shall be continued thereafter" phrase in its finding of vested lifetime benefits. Similarly, in *Hinckley v. Kelsey-Hayes*, 866 F. Supp. 1034, 1040 (E.D. Mich. 1994), the district court granted a preliminary injunction for plaintiffs, based in part on its finding that:

> plaintiffs have cited specific provisions that indicate that retiree health benefits will be continued throughout their retirement years, beyond the expiration of any particular collective bargaining agreement. For example, section 5 of Article III of the 1991 agreement states that once an employee has retired or terminated employment at age sixty-five, his health benefits "shall be continued thereafter." Surviving spouses are assured that they will receive health benefits "as long as monthly survivor income benefits" are payable.

866 F. Supp. at 1042. The *Hinckley* court found vested lifetime benefits even where, as here, the language of the agreement stated that "[t]he health care coverages an employee has under this Article at the time of retirement or termination of employment at age 65 or older . . . *shall be continued thereafter provided that*

suitable arrangements for such continuation[] can be made with the carrier(s)." *Id.* at 1039 (emphasis added).

For these reasons, the court finds that the "provided for" phrase does not express an unambiguous intent not to vest benefits. Instead, consistent with *ArvinMeritor* and *Hinckley*, the court finds that the "shall be continued thereafter" language indicates an unambiguous intent for Plaintiffs' health care benefits to continue after the CBA terminated.

2. Whether Health Care Benefits Are Linked to Pension Eligibility

Plaintiffs argue that the CBA links retirees' health care benefits to pension eligibility and that, because pension benefits are for life, this link evidences an intent to vest health care benefits for life. This proposition was explained in *Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410, 415 (E.D. Mich. 1994), where the court granted a preliminary injunction for the plaintiffs, finding that "[t]here are no express provisions of the collective bargaining agreements that limit the duration of retiree health benefits. In fact, each of the collective bargaining agreements provides that eligibility for retiree health benefits is tied to eligibility for lifetime pension benefits or survivor spouse income." The Sixth Circuit affirmed, holding that "[s]ince retirees are eligible to receive pension benefits for life, the court found that the parties intended that the company provide lifetime health benefits as well." *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996). The district court later relied on this evidence in granting summary judgment for the plaintiffs. *Golden v. Kelsey-Hayes Co.*, 954 F. Supp.

1173, 1187 (E.D. Mich. 1997). In addition, other district courts within the Sixth Circuit have held similarly, and the Sixth Circuit has upheld the granting of preliminary injunctions by district courts on this basis. *E.g.*, *Yolton*, 435 F.3d at 580; *McCoy v. Meridian Auto. Sys.*, 390 F.3d 417, 422 (6th Cir. 2004); *ArvinMeritor*, 516 F. Supp. 2d 850, *46-*47 (E.D. Mich. Dec. 22, 2005); *Hinckley*, 866 F. Supp. at 1042. Furthermore, just as in those cases, the CBA in the instant case does not include any express provisions "that limit the duration of retiree health benefits or that allow [the employer] to modify or terminate those benefits at will." *Hinckley*, 866 at 1042; *accord Golden*, 845 F. Supp. at 413-14, 415.

Defendant points out that other sections provide health care benefits to retirees who are *not* eligible for pension. Consequently, Defendant argues, no link with pension benefits exists to suggest an intent to vest lifetime health care benefits for retirees.

The relevant sections read, in pertinent part:

> Article I Establishment, Financing and Administration of Insurance Program
>
> . . . .
>
> Section 3. Company Contributions and Administration
>
> . . . .
>
> (b) Company Contributions for Health Care Coverages

. . . .

> (7) For Retired and Certain Former Employees
>
> The Company shall contribute the full premium or subscription charge for Health Care (including vision effective April 1, 1981) coverages continued in accordance with Article III, Section 5, for:
>
> (i) a retired employee (including any eligible dependents), provided such retired employee is eligible for benefits under Article II of the Euclid, Inc., Hourly-Rate Employees Pension Plan and
>
> (ii) an employee (including any eligible dependents) termination at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of The Euclid, Inc., Hourly-Rate Employees Pension Plan.[3]

As the quoted language indicates, Article I, Section 3(b)(7)(i) links health care benefits to pension benefits, while Article I, Section 3(b)(7)(ii) does not. However, despite Defendant's argument otherwise, this inconsistency is not fatal to Plaintiffs' argument.

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[3] Likewise, some of the provisions regarding health care benefits for surviving spouses are linked to the pension eligibility of the employee. (*See* Art I., § 3(8)(i); Art. III, § 6(b)(1)-(2), (4), at 23-B, 97-B-98-B.) Others are not. (*See* Art. I, § 3(b)(ii); Art. III, § 6(b)(3), at 23-B, 98-B.)

Instead, it creates an ambiguity that allows the court to look at extrinsic evidence, in particular the SPD, to determine the parties' intent. This approach was taken by the Sixth Circuit in *Golden*, which found that "[a] provision of one of the SPDs provides that those employees who retire *without* pension eligibility because they have not been with the company long enough to participate in the pension plan will, nonetheless, have *lifetime* health coverage at no cost." 73 F.3d at 656. The *Golden* court agreed with the plaintiffs' argument that "this specific language was necessary because these retirees do not have lifetime pension benefits to which to tie eligibility for health coverage, as do all the other retirees." *Id.*

The instant SPD states, in relevant part:

> **General Information About Employee Benefits**
> **EUCLID PAYS THE FULL COST . . .**
> . . . .
>
> When you are retired, your life and extra accident insurance and all of your Health Care coverages are continued without cost to you. . . . .
>
> If you terminate employment with Euclid at age 65 or older for any reason other than discharge for cause, all of your Health Care coverages will be continued for the rest of your life without cost to you.
>
> Euclid also pays the full cost of Health Care coverages for surviving spouses and eligible children of deceased pensioners and of

> employees who die after they are eligible to retire voluntarily under the Euclid Pension Plan.

(Euclid, Inc. Hourly-Rate Employees Benefit Plans, April 1, 1983 ("SPD") 26, ECF No. 161-3.) The language in the instant SPD is virtually identical to the language of the SPD in *Golden*, in which the district court granted summary judgment for the plaintiffs. *Golden*, 954 F. Supp. at 1176-77.

Moreover, the Sixth Circuit has held that "the language of SPDs is binding, and where there is a conflict between the language of the SPD and the other official plan documents, it is the SPD which is controlling." *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 250 (6th Cir. 1996) (citing *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988)).

Finally, the court rejects Defendant's argument that the SPD document is not valid because it does not contain all the categories of information required under 29 U.S.C. § 1022(b) and 29 C.F.R. § 2520.102-3. The court finds that the SPD includes all required information, including a description of the claims and appeal procedure, a statement of how the plan is administered, and a statement of how the collective bargaining agreement is maintained and that it is available for participants to examine upon request. (*See* SPD at 17-18, 26-30.)

3. Duration Clause

The parties disagree about the effect of a duration clause contained in the Supplemental Agreement Exhibit B to the CBA ("Insurance Program

Agreement"), which applies to both the health care and life insurance benefits. Defendant argues that the CBA was unambiguously intended not to vest lifetime health care and life insurance benefits because the duration clause in the Insurance Program Agreement explicitly limits the duration of the insurance benefits to the time period that the CBA is in effect (*i.e.*, from 1983 to 1986). Plaintiffs argue that the provision is merely a "routine" or "general" duration clause, and is therefore not dispositive as to the duration of benefits. *See Yolton*, 435 F.3d at 580; *Yard-Man*, 716 F.2d at 1482-83.

The disputed duration clause in the Insurance Program Agreement reads as follows:

> **Section 10. Duration of Agreement**
>
> This Agreement and Program as modified and supplemented by this Agreement shall continue in effect until the termination of the Collective Bargaining Agreement of which this is a part.

(Supplemental Agreements at 14-B.) The Agreement defines "Program" as the "amended insurance program" attached to the Supplemental Agreement, which provides both health care and life insurance benefits. (*See id.* at 1-B.) The "Agreement" refers to the Insurance Program Agreement. (*See id.*) Defendant argues that a reading of the duration clause indicates that the Insurance Program Agreement is a part of the CBA and terminates on the date that the CBA terminates, and therefore the health care and life insurance benefits provided by the Insurance Program Agreement also terminate at that time.

a. Lack of Specific Reference to Benefits or Coverage

Defendant relies upon *UAW v. Cleveland Gear Corp.*, No. C83-947, 1983 U.S. Dist. LEXIS 20400 (N.D. Ohio Oct. 20, 1983). However, the court finds that case to be distinguishable from the circumstances involved herein. In *Cleveland Gear*, the court found that the Master Contract and the Insurance Agreement expressly limited the duration of the insurance benefits to the duration of the CBA. The duration clause in the Master Contract is similar to the duration clause in the instant case. However, the duration clause in the Insurance Agreement expressly stated that "[t]his Group Insurance Plan, *and all group insurance coverage provided hereunder*, shall be effective . . . until discontinued or superceded either in whole or in part by the termination or suspension of such Collective Bargaining Agreement . . . ." *Id.* at *8. The duration clause in the instant case, on the other hand, does not reference either the insurance benefits or coverage. Consequently, it is not clear that the instant duration clause was intended to terminate insurance benefits upon the termination of the CBA.

On the other hand, the court finds that Plaintiffs' reliance on *Hinckley* is well-taken. The court in *Hinckley* held that a duration clause identical to the one in the instant case was merely a "routine" durational clause. *Id.* The *Hinckley* court stated that the duration clauses that the defendant cited were "provisions that merely incorporate supplemental agreements concerning pension plans, unemployment benefit plans, and health care insurance programs into the collective bargaining agreement itself." *Id.* at 1041. Significantly, the court continued,

> *[b]ecause such incorporated supplemental agreements would terminate on the date when the collective bargaining agreement terminated says nothing about the duration of particular benefits, especially benefits for retirees.* Defendant does not cite to any provision that specifically limits the duration of any particular benefit. This was also the key element that was missing from the durational clause addressed by the Sixth Circuit in *Yard-Man*. *Yard-Man*, 716 F.2d at 1482.

Id. (footnote omitted and emphasis added). Likewise, the duration clause in the instant case does not specifically limit the duration of any particular benefit. Therefore, consistent with *Hinckley*, the court finds that the duration clause in the Insurance Plan Agreement is merely routine and general.

b. The Effect of the Duration Clause in the Pension Plan Agreement

Furthermore, Plaintiffs point out that the Supplemental Agreement Exhibit A to the CBA ("Pension Plan Agreement") contains a duration clause nearly identical to the one in the Insurance Plan Agreement:

> **Section 9. Duration of Agreement**
>
> This agreement and Plan shall continue in effect until the termination of the collective bargaining agreement of which this is a part.

(Pension Plan Agreement at 15-A.) In this clause, "agreement" refers to the Pension Plan Agreement,

and "Plan" refers to the "amended pension plan" that is attached to the Supplemental Agreement. (*See id.* at 1-A.) Thus, following Defendant's logic as to the Insurance Plan Agreement, the pension plan, too, would terminate on the date that the CBA terminates, even though pension benefits "are understood to be life." *Cole v. ArvinMeritor, Inc.*, 516 F. Supp. 2d 850, at *54 (E.D. Mich. 2005). In response, Defendant acknowledges that the duration clause *should not* terminate the pension benefit. Defendant argues, however, that it *should* terminate the insurance benefit. In essence, Defendant contends that the same language should have one meaning as to one benefit and an opposite meaning as to another benefit. Courts have rejected this argument, and have instead held that the same language used with regard to pension and life insurance benefits should be given the same effect as to each benefit. When faced with this issue, the Sixth Circuit stated:

> The plaintiffs assert . . . that because pension plans are vested benefits and because the CBA uses the same durational language for pension plans that it uses for the health care benefits, the health care benefits also must be vested benefits. They argue that the agreements would not use the same language . . . if it had different meanings. . . . . Reviewing "each provision in question as part of the integrated whole," the use of similar language in sections [regarding pension benefits and health care benefits] provides substantial support for the plaintiffs's [sic] position. *Yard-Man*, 716 F.2d at 1479.

Yolton, 435 F.3d at 581 (footnotes omitted). Similarly, relying on *Yolton*, the court in *Cole v. ArvinMeritor*,

Inc., No. 03-73872, 2006 U.S. Dist. LEXIS 65078, at *30 (E.D. Mich. Sept. 13, 2006), reasoned:

> Despite the substantial similarity in these duration clauses, Defendants argue that, although vested pension benefits do not end when a CBA expires, health benefits do. This Court disagrees. Virtually identical language would not be used if it was intended to have one meaning as to health benefits and another as to pension benefits.

See Hinckley, 866 F. Supp. at 1041 n.4 ("Given defendant's logic, because its pension plan was incorporated into the collective bargaining agreement, its obligation to provide pensions to past retirees would end with the expiration of the current agreement."). The court finds the reasoning in *Yolton*, *ArvinMeritor*, and *Hinckley* persuasive. Therefore, the court finds that the duration clause in the Insurance Plan Agreement does not terminate the health care and life insurance benefits at issue.

Therefore, for all the reasons discussed, the court finds that both the express language of the CBA as well as the SPD evidence an unambiguous intent to vest lifetime, fully-funded health care benefits for Plaintiffs.

E. Life Insurance Benefits for Retirees

1. Whether the CBA Reserved Employer's Right to Modify or Terminate Life Insurance Benefits

Defendant argues that two provisions of the Life Insurance Program enable the employer to modify or

terminate retirees' life insurance benefits, therefore demonstrating an unambiguous intent that the life insurance coverage does not vest for life. The court disagrees.

Defendant points to Article II, Section 10(d)(3), which states, in relevant part:

> **Section 10. Provisions for Employees Not Actively at Work**
>
> . . . .
>
> (d) Cessation of Insurance and Conversion Privilege
>
> . . . .
>
> (3) All insurance shall automatically cease upon the discontinuance of the Plan, or, if the provisions thereunder for any one of the forms of coverage in this Article are discontinued, that form of coverage shall be discontinued.

(Insurance Plan Agreement, Supplemental Agreements at 77-B.) The court agrees that this provision may arguably be read to reserve the employer's right to terminate life insurance coverage. The question, however, is to what coverage and to which employees the provision applies. As Plaintiffs point out, this provision appears in a section that "primarily addresses employees on layoff or disability leave." In addition to life insurance, the provision also addresses sickness and accident insurance and disability insurance. (Pls.' Opp'n Br. 10 n.9, ECF No. 160.) Life insurance benefits for retirees, on the other hand, are set forth in Article II, Section 3. Consequently, the provision upon which Defendant

relies does not apply to life insurance benefits for Plaintiff retirees.

Defendant also points to Article II, Section 3(b)(1)(i), which states, in relevant part:

> (b) Continuing Life Insurance After Age 65
>
> . . . .
>
> (i) . . . . Such remaining Life Insurance will be continued thereafter until the death of the employee, subject to the rights reserved to the Company to modify or discontinue this Plan.

(Insurance Plan Agreement, Supplemental Agreements at 44-B.) This provision appears in Section 3, entitled, "Life Insurance," which details life insurance benefits for employees both prior to, and after, age 65. Article IV, entitled "Definitions," defines "Plan" as "that portion of the Program referred to in Articles II and III, respectively." As stated previously, "Program" refers to the "amended insurance program" (in this case, the Life Insurance Program in Article II).

Defendant argues that this provision reserves the employer's right to unilaterally modify or discontinue Plaintiffs' life insurance benefits at any time. Plaintiffs argue that, at most, the employer "may have reserved the right to replace the specific life insurance plan with another, [but the employer] never reserved the right to discontinue the *benefits* provided by the plan." (Pls.' Opp'n Br. at 10 n.8.) Alternatively, Plaintiffs argue that the provision creates an ambiguity, which would therefore allow the court to examine extrinsic evidence to determine the parties' intent. As discussed

below, the court finds that this provision is not ambiguous and that it does not constitute a reservation of Defendant's right to unilaterally terminate Plaintiffs' life insurance benefits.

The language in the instant case is far less specific than language that courts have found to constitute a reservation of rights. In *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 919 (6th Cir. 2000), the Sixth Circuit held that an employer had adequately reserved its right to terminate retiree benefits where it had distributed handbooks to the retirees expressly stating that coverage could be amended or terminated. The reservation of rights language in the handbooks stated, in relevant part:

> Amendments. [The employer] reserves the right to amend or terminate any of the plans. The right to amend includes the right to curtail or eliminate coverage for any treatment, procedure, or service regardless of whether you are receiving treatment for an injury, illness, or disease contracted prior to the effective date of the amendment.
>
> . . . .
>
> Plan Changes. This insert summarizes your current retiree health care coverage. However, since no one can predict the future, Joy reserves the right to make changes or terminate these Plans.

Id. at 913 (emphasis omitted). The language in *Maurer* expressly mentions coverage and lists benefits in detail that could be terminated. As such, *Maurer* is distinguishable from the instant case.

The Sixth Circuit has recently reemphasized the general rule that "an existing contract cannot be unilaterally modified" and that "[t]his principle applies with equal force to collective-bargaining agreements, where employers are statutorily barred from effectuating unilateral modification[s] of . . . existing collective bargaining agreement[s]." *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 443 (6th Cir. 2007) (citations and internal quotation marks omitted). In *Prater*, the court noted that it had previously limited *Maurer*'s holding to "unqualified reservation-of-rights language . . . that claims a unilateral right by the employer to terminate coverage without regard to existing or future collective bargaining agreements . . . ." *Id.* at 444 (quoting *McCoy*, 390 F.3d at 425) (internal quotation marks omitted). The disputed language in *Prater* stated, in relevant part:

> While the employer expects retiree coverage to continue, the employer reserves the right to modify or discontinue retiree coverage at any time . . . . [The employer] may modify or amend the Plan from time to time in accordance with the provision of the collective bargaining agreement. . . . The Plan Administrator . . . may change or eliminate benefits under the plan and may terminate the entire plan or any portion of it.

Id. at 440 (quotation marks and citations to the record omitted). The *Prater* court reversed the district court's grant of summary judgment for the employer, holding that the employer had not reserved a right to unilaterally terminate contractual rights, in part, because the language was not as specific as that found in *Maurer*. *Id.* at 444 ("As in *McCoy*, neither summary

explicitly represented to the retirees that existing medical treatment could be cut off, as the summary in *Maurer* did.").

Although the reservation of rights language in *Prater*, *McCoy*, and *Maurer* was all found in Summary Plan Descriptions and other extrinsic evidence, the court finds that the principles regarding reservation of rights set forth in these cases apply equally well to the language in the instant case. The purported reservation-of-rights language in the instant case is more similar to the language found in *Prater* than that in *Maurer* because of its lack of specific reference to the coverage or benefits themselves. Furthermore, the court finds it significant that the language that may be read to specifically reserve the employer's right to discontinue benefits for employees who are on layoff or disability leave does not appear in the section that outlines the life insurance benefit in general and for retirees. The absence of language from one section that appears in another section can provide evidence as to the parties' intent. *Cf. Yard-Man*, 716 F.2d at 1481-82 (finding the fact that specific duration clauses appeared in some sections evidenced an intent to not limit the duration of benefits where no such clause appeared). Therefore, the court finds that Defendant has not reserved its right to unilaterally terminate retirees' life insurance benefits.

Without the purported reservation-of-rights language, Article II, Section 3(b)(1)(i) states that "[s]uch remaining Life Insurance will be continued thereafter until the death of the employee . . . ." (Insurance Plan Agreement, Supplemental Agreements at 44-B.) In addition, Article II, Section 3(b)(3) provides that "[n]o employee contributions for

Life Insurance are required after attainment of age 65." (*Id.* at 45-B.) Taken together, these two provisions demonstrate that the CBA intended to provide lifetime, fully funded life insurance benefits to retirees.

2. Duration Clause

As discussed previously, the duration clause in the CBA applies to both the health care benefits and the life insurance benefits. Consequently, the court's finding regarding the health care benefits, that the duration clause is merely routine and does not terminate benefits upon the termination of the CBA, is equally applicable to the life insurance benefits.

Therefore, for all the reasons discussed, the court finds that the CBA intended to vest lifetime, fully-funded life insurance benefits for Plaintiff retirees.

* * *

As discussed above, the court finds that the parties intended to create fully-vested, lifetime health care and life insurance benefits for Plaintiffs. Accordingly, the court hereby grants summary judgment to Plaintiffs, as well as declaratory and injunctive relief. The court orders VCENA, under ERISA and the LMRA, to maintain fully- funded health care insurance benefits to Plaintiff retirees, spouses, surviving spouses, and eligible dependents of retirees and fully-funded life insurance benefits to Plaintiff retirees.

F. Plaintiffs' Motion for Preliminary Injunction and Defendant's Motion to Strike

As the court has granted final relief for Plaintiffs, the Motion for Preliminary Injunction (ECF No. 182) is denied as moot. Similarly, Defendant's Motion to Strike (ECF No. 195), which seeks to strike affidavits that Plaintiffs submitted in support of their Motion for Preliminary Injunction, is also denied as moot.

IV. CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Summary Judgment (ECF No. 155) is granted, Defendant's Motion for Summary Judgment (ECF No. 156) is denied, Plaintiffs' Motion for Preliminary Injunction (ECF No. 182) is denied as moot, and Defendant's Motion to Strike (ECF No. 195) is denied as moot. The court hereby grants declaratory and injunctive relief for Plaintiffs, ordering that VCENA is obligated under ERISA and the LMRA to maintain fully-funded health care insurance benefits to Plaintiff retirees, spouses, surviving spouses, and eligible dependents of retirees and fully- funded life insurance benefits to Plaintiff retirees during the lifetime of the class representatives and class members.

Plaintiffs shall file any documentation regarding their request for attorney's fees and costs within 14 days of the date of this Order. Defendant shall then have 10 days to file any response.

IT IS SO ORDERED.

/s/SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

March 17, 2008

Supreme Court, U.S.
FILED
JAN 19 2010
OFFICE OF THE CLERK

No. 09-601

In The
Supreme Court of the United States

VOLVO CONSTRUCTION EQUIPMENT NORTH AMERICA, INC.,
Petitioner,

v.

ISAAC ROSE, PEGGY H. KNOX, JOSEPH E. HENDERSON, WILBERT WHITT, OPAL B. WHITT, ANDREW J. BERGANT, JR., A.C. WADE, METRO BURTYK, INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Sixth Circuit correctly applied ordinary principles of contract interpretation to determine that the 1983 collective bargaining agreement vested retiree health and life insurance benefits.

PARTIES TO BRIEF

Respondents in this case are Isaac Rose, Peggy H. Knox, Joseph E. Henderson, Wilbert Whitt, Opal B. Whitt, Andrew J. Bergant, Jr., A.C. Wade, Metro Burtyk, and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. Respondents were plaintiffs-appellees below.

In this brief Respondents are referred to as "Retirees" or "Plaintiffs."

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED i

PARTIES TO BRIEF ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 1

I. INTRODUCTION 1

II. FACTS 2

A. The Plant, the Parties and their History .. 2

B. The CBAs and the Decisions Below 5

ARGUMENT 12

I. THERE IS NO SPLIT AMONG THE CIRCUITS 12

A. The Circuits Agree That No Automatic Presumptions Apply 12

B. All Retiree Benefit Cases Turn on All Relevant Facts, Not on the Presence or Absence of Talismanic Words or Phrases. . 18

1. VCENA's "Shall be Continued" Argument 18

2. VCENA's Pension Linkage Argument . 21

3. VCENA's Durational Clause Argument . 22

C. No Circuit Split on How Collectively-Bargained and Unilaterally-Provided ERISA Benefit Cases Are Treated 24

II. THE DECISIONS BELOW ARE CONSISTENT WITH DECISIONS OF THIS COURT 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Alday v. Raytheon Co.,
No. CV 06-32 TUC DCB, 2008 U.S. Dist. LEXIS 62747 (D. Ariz. Aug. 5, 2008) 15

Anderson v. Alpha Portland Indus., Inc.,
836 F.2d 1512 (8th Cir. 1988) 2, 22

Balestracci v. NSTAR Elec. & Gas Corp.,
449 F.3d 224 (1st Cir. 2006) 25

Barnett v. Ameren Corp.,
436 F.3d 830 (7th Cir. 2006) 17

Bidlack v. Wheelabrator Corp.,
993 F.2d 603 (7th Cir. 1993) 1, 2, 17, 20

Bittinger v. Tecumseh Prods. Co.,
201 F.3d 440 (6th Cir. 1999) 18

Bland v. Fiatallis N. Am., Inc.,
401 F.3d 779 (7th Cir. 2005) 1, 2

Carriers Container Council, Inc.,
896 F.2d 1330 (11th Cir. 1990) 23

Cherry v. Auburn Gear, Inc.,
441 F.3d 476 (7th Cir. 2006) 17

Chiles v. Ceridian Corp.,
95 F.3d 1505 (10th Cir. 1996) 26

Cole v. ArvinMeritor,
549 F.3d 1064 (6th Cir. 2008) ..... *passim*

Curtiss-Wright Corp. v. Schoonejongen,
514 U.S. 73 (1995) 16, 27

Diehl v. Twin Disc., Inc.,
102 F.3d 301 (7th Cir. 1996) 17

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 22

Gable v. Sweetheart Cup Co.,
35 F.3d 851 (4th Cir. 1994) 26, 27

Golden v. Kelsey-Hayes Co.,
73 F.3d 648 (6th Cir. 1996) 17

Harps v. TRW Auto.,
No. 09-3214, 2009 U.S. App. LEXIS 24242 (6th Cir. Nov. 3, 2009)(unpublished opinion) .. 18, 23

Helwig v. Kelsey Hayes,
93 F.3d 243 (6th Cir. 1996) 1, 28

In re Lucent Death Ben. ERISA Litig.,
541 F.3d 250 (3d Cir. 2008) 1

In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.,
58 F.3d 896 (3d Cir. 1995) 25

Joyce v. Curtis-Wright Corp.,
992 F. Supp. 259 (W.D.N.Y. 1999) 21

Joyce v. Curtiss-Wright Corp.,
171 F.3d 130 (2d Cir. 1999) 21

Litton Fin. Printing v. NLRB,
501 U.S. 190 (1991) 28, 29

Machinists v. Masonite Corp.,
122 F.3d 228 (5th Cir. 1997) 1, 2

Mauer v. Joy Techs., Inc.,
212 F.3d 907 (6th Cir. 2000) 18

McCoy v. Merdian Auto Sys., Inc.,
390 F.3d 417 (6th Cir. 2004) 17

Murphy v. Keystone Steel & Wire Co.,
61 F.3d 560 (7th Cir. 1995) 17, 23

Nachman Corp. v. Pension Benefit Guar. Corp.,
446 U.S. 359 (1980) 27

Nichols v. Alcatel,
532 F.3d 364 (5th Cir. 2008) 1, 15

Noe v. PolyOne Corp.,
520 F.3d 548 (6th Cir. 2008) 15, 28

Pabst Brewing Co. v. Corrao,
161 F.3d 434 (7th Cir. 1998) 17

Prater v. Ohio Educ. Ass'n,
505 F.3d 437 (6th Cir. 2007) 15

Reese v. CNH Am. LLC,
574 F.3d 315 (6th Cir. 2009) 1, 14, 27

Rossetto v. Pabst Brewing Co.,
217 F.3d 539 (7th Cir. 2000) 13, 16, 17, 26

Schreiber v. Philips Display Components Co.,
580 F.3d 355 (6th Cir. 2009) 14, 28

Senior v. NSTAR Elec. & Gas Corp.,
449 F.3d 206 (1st Cir. 2006) 15

Senn v. United Dominion Indus., Inc.,
951 F.2d 806 (7th Cir. 1992), cert denied, 509
U.S. 903 (1993) 17, 18, 20

Sprague v. General Motors Corp.,
133 F.3d 388 (6th Cir. 1998) 26, 28

Trull v. Dayco Prods.,
No. 04-2109, No. 05-1591, 178 Fed. Appx. 247;
2006 U.S. App. LEXIS 10640 (4th Cir. Apr. 28,
2006) 27

UAW v. Cleveland Gear Corp.,
No. 83-3839, 1984 U.S. App. LEXIS 13700 (6th
Cir. Oct. 24, 1984) 18

UAW v. Skinner Engine Co.,
188 F.3d 130 (3d Cir. 1999) ..... *passim*

UAW v. Yard-Man,
716 F.2d 1476 (6th Cir. 1983), cert denied, 465
U.S. 1007, 104 S. Ct. 1002, 79 L.Ed. 2d 234
(1984) ..... *passim*

United Steelworkers of Am., AFL-CIO v. Textron, Inc.,
836 F.2d 6 (1st Cir. 1987) 18, 19

United Steelworkers of Am., AFL-CIO-CLC v. Connors Steel Co.,
855 F.2d 1499 (11th Cir. 1988) 23

Vallone v. CNA Fin. Corp.,
375 F.3d 623 (7th Cir. 2004) 21, 22, 25

Wood v. Detroit Diesel Corp.,
213 Fed. Appx. 463 (6th Cir. 2007) (unpublished opinion) 15

Yolton v. El Paso Tenn. Pipeline Co.,
435 F.3d 571 (6th Cir. 2006), cert denied, *CNH Am. LLC v. Yolton*, 549 U.S. 1019 (U.S. 2006) ..... *passim*

Zielinski v. Pabst Brewing Co.,
463 F.3d 615 (7th Cir. 2006) 17

COUNTERSTATEMENT OF THE CASE

I. INTRODUCTION

For a period of time in the last century, through collective bargaining, some employers promised to provide retiree benefits to their employees. As those employees retired and the cost of retiree benefits began to soar, some employers attempted to limit or avoid those obligations. Those attempts led to a number of retiree benefit cases around the country.

In resolving those disputes, the circuits unanimously endorsed the core rules of contractual interpretation to be applied in these cases. To be expected, minor differences existed initially in the various articulations of those rules from circuit to circuit. As this area of the law matured, however, the circuits themselves recognized that no conflict exists. All circuits agree on the applicable rules of contract interpretation in these cases, and none have adopted any outcome-determinative rule.

The core rules of interpretation which have been unanimously endorsed by the circuits are pure hornbook law: 1) unlike pension benefits, welfare benefits do not automatically vest;[1] 2) the parties to a

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[1] *Reese v. CNH Am. LLC*, 574 F.3d 315, 321 (6th Cir. 2009); *Helwig v. Kelsey Hayes*, 93 F.3d 243, 248 (6th Cir. 1996); *In re Lucent Death Ben. ERISA Litig.*, 541 F.3d 250, 253 (3d Cir. 2008); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 137 (3d Cir. 1999); *Nichols v. Alcatel*, 532 F.3d 364, 377 (5th Cir. 2008); *Machinists v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 604-605 (7th Cir. 1993); *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 783 (7th Cir. 2005); and

collective bargaining agreement may nevertheless agree to vest retiree welfare benefits;[2] and 3) extrinsic evidence may be considered if a contract is ambiguous on the question of whether parties intended retiree benefits to vest.[3] Each of the circuits has applied these rules to widely varying factual situations. All have reached results consistent with their sister circuits.

II. FACTS

A. The Plant, the Parties and their History

Since at least the 1950s, Volvo Construction Equipment North America, Inc. ("VCENA") and various other corporate entities owned and operated a plant in Euclid, Ohio involved with heavy truck manufacturing, engineering, and testing ("Euclid Facility"). Pet. Appx. 6a. The Plaintiffs are a class of retirees (and their spouses and dependents) who retired from the Euclid Facility by 1987, either before or while it was owned by VCENA. By virtue of the 1983-1986 collective bargaining agreement negotiated

---

Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1516 (8th Cir. 1988).

[2] *See UAW v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983); *UAW v. Skinner Engine Co.*, 188 F.3d at 138; *Machinists v. Masonite Corp.*, 122 F.3d at 231; *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d at 783; *Bidlack v. Wheelabrator Corp.*, 993 F.2d at 607; *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d at 1517.

[3] *See Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1070 (6th Cir. 2008); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 579 (6th Cir. 2006), cert denied, *CNH Am. LLC v. Yolton*, 549 U.S. 1019 (U.S. 2006); *Bidlack v. Wheelabrator Corp.*, 993 F.2d at 607; *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d at 1516.

by the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") on their behalf, the Plaintiffs were promised lifetime health insurance benefits and life insurance benefits for the lifetime of the retirees (not their spouses).

The contractual language that established lifetime retiree benefits is nearly identical to the contractual benefits language negotiated nationally by the UAW with a number of companies and had been included in the Euclid Facility's collective bargaining agreements for decades.

As explained by Thomas Tupa, who held the position of either Director and/or Vice President of Human Resources at the Euclid Facility for thirty-nine years and was a member of the company's negotiating committee that negotiated the 1983 CBA, the retiree benefits language came from a "pattern contract" that was first negotiated in 1965 when the Euclid Facility was a division of General Motors. When the Euclid Facility left General Motors "we signed a memorandum of understanding and took the then existing contract from GM. So we had a GM contract, but we weren't GM. So we never substantially broke the GM pattern." *See* Tupa Deposition Transcript, at pp. 10-11, 17, 32.

VCENA was operating under the name Clark Michigan Company in 1984 when it purchased the assets of the Euclid Facility and expressly assumed the 1983-1986 CBA. Pet. Appx. 6a. Years later, VCENA sold its interest in the Euclid Facility to Euclid Hitachi Heavy Equipment, Inc. ("EHHE"). By

the time VCENA transferred its ownership interest to EHHE, all the Retirees had already retired.[4]

The buyer of VCENA's interest in the Euclid Facility entered into an asset purchase agreement with VCENA in which, *inter alia,* it assumed VCENA's obligations for retiree benefits. However, neither the UAW nor the Retirees ever released VCENA from its obligation to provide those benefits. This was of no moment because over the years, on behalf of VCENA, EHHE continued to provide the contractual benefits to the Retirees. EHHE also negotiated new CBAs with the UAW, but none of those CBAs covered the Retirees who already had retired by that time.[5]

This all changed when in 2005 EHHE announced that it had unilaterally decided to cease paying health and life insurance benefits for the Retirees. Plaintiffs protested both to VCENA and EHHE. Although EHHE agreed to negotiate some resolution with the UAW, VCENA completely denied any liability. Subsequently, the Plaintiffs filed the instant lawsuit against VCENA while the UAW continued to negotiate

---

[4] VCENA's suggestion that it was not bound to the 1983 collective bargaining agreement and never employed any of the Retirees is incorrect.

[5] VCENA's statement that it was "without authority or standing to bargain for the continuation, modification or cessation of the retiree welfare benefits in subsequent collective bargaining agreements", Pet. 10, is true but irrelevant because no one, including VCENA's successors and the UAW, had the authority to modify the retirees' benefits that had already vested when those employees retired before VCENA terminated its ownership interest.

a resolution with EHHE.[6] Ultimately, partial settlement was reached with EHHE, but the Plaintiffs were forced to fully – and successfully – litigate their claim against VCENA.

B. The CBAs and the Decisions Below

In granting and affirming Plaintiffs' motion for summary judgment,[7] the courts below conducted a detailed analysis of the explicit language of the collective bargaining agreement in order to determine the parties' intent and concluded that the retiree benefits were vested for life.

The 1983 CBA contained a section entitled "Pension Plan, Insurance Program and Supplemental Unemployment Benefit Plan" that stated, "The parties have provided for a Pension Plan, an Insurance Program and a Supplemental Unemployment Benefit Plan by Supplemental Agreements signed by the parties simultaneously with the execution of this Agreement." (6th Cir. Appx. 85) The specific language regarding those fringe benefits was set forth in these Supplemental Agreements.

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[6] VCENA incorrectly states that under the settlement, EHHE "sent Respondents in VCENA's direction to pursue any additional recovery." Pet. 10. In fact, the instant lawsuit already was pending at the time the settlement was reached. The settlement merely preserved Plaintiffs' rights to continue to pursue VCENA for their full benefits.

[7] The District Court granted summary judgment. Pet. Appx. B. The Sixth Circuit affirmed in an unpublished opinion, expressly adopting the decision of the District Court. Pet. Appx. A.

Article III, Section 5(a) of the Supplemental Agreements promises retiree health care benefits to Plaintiffs during retirement:

> **Continuance of Health Care (Other than Vision) Coverages Upon Retirement or Termination of Employment at Age 65 or Older**
>
> (a) Health Care Coverages, an employee has under this Article at the time of retirement or termination of employment at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of the Euclid, Inc., Hourly-Rate Employees Pension Plan ***shall be continued thereafter*** provided that suitable arrangements for such continuation can be made with the local plans, or insured plan. Contributions for coverages so continued shall be in accordance with Article I, Section 3(b)(7).

(6th Cir. Appx. 261)(emphasis added).

The obligation to provide health care benefits includes contributions for any eligible spouses, surviving spouses and dependents of those retirees. Article I, Section 3(b)(8) of the Supplemental Agreements states:

> (8) For Surviving Spouses:
>
> (i) The Company shall contribute the full premium or subscription charge for

> Health Care (including Vision effective April 1, 1981) coverages continued in accordance with Article III, Section 6(b) only on behalf of a surviving spouse as defined in Article III, Section 6(b)(1), (2), (3) and (4) and in Article III, Section 6(c) (including for this purpose a surviving spouse who would receive survivor benefits under Article II, Section 6 of The Euclid, Inc., Hourly-Rate Employees Pension Plan except for receipt of survivor income benefits under Article II of this Program), and the eligible dependents of any such spouse...

(6th Cir. Appx. 225).

Article III, Section 6 of the Supplemental Agreements states:

> **Continuance of Health Care Coverages for Surviving Spouse of an Employee, or a Retire [sic] or Certain Former Employer**
>
> (b) The Corporation shall make suitable arrangements for a surviving spouse
>
> (1) of an employee or retired employee, (but not of a former employee eligible for a deferred pension) if such spouse is receiving or is eligible to receive a survivor pension benefit under Article II, Section 6 or 9(d) of The Euclid, Inc., Hourly-Rate Employees Pension Plan,
>
> (2) of a retired employee if, prior to his death, he was receiving a benefit under Article

II of The Euclid, Inc., Hourly-Rate Employees Pension Plan,

(3) of a former employee whose employment was terminated at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of The Euclid, Inc., Hourly-Rate Employees Pension Plan,

(4) of an employee who at the time of his death was eligible to retire on an early or normal pension under Article II of The Euclid, Inc., Hourly-Rate Employees Pension Plan, to participate in the Health Care (other than Vision prior to April 1, 1981) Coverage referred to in Section 1 of this Article; provided, however, that Dental Coverage shall be available to a surviving spouse age 65 or over only for months that such surviving spouse has the voluntary coverage that is available under the Federal Social Security Act by making contributions. Subject to availability of the coverages, such participation will be as a part of the groups covered.

(6th Cir. Appx. 262).

Article I, Section 3(b)(9) concludes:

(9) The Company shall pay the balance of the net cost of the Program as set forth in Article III over and above any employee contributions specified in Article III. It shall also pay any increase in such costs and shall receive and retain any divisible surplus,

> credits or refunds or reimbursements under whatever name, arising out of any such Program.

(6th Cir. Appx. 225). Pursuant to this paragraph, VCENA had the obligation to pay any increases in the cost of the insurance program.

Article I, Section 3(b)(7) of the Supplemental Agreements links health care coverage to pension eligibility:

> (7) For Retired and Certain Former Employees
>
> The Company shall contribute the full premium or subscription charge for Health Care (including vision effective April 1, 1981) coverages continued in accordance with Article III, Section 5 for:
>
> (i) a retired employee (including any eligible dependents), provided such retired employee is eligible for benefits under Article II of the Euclid, Inc., Hourly-Rate Employees Pension Plan and
>
> (ii) an employee (including any eligible dependents) termination at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of the Euclid, Inc. Hourly-Rate Employees Pension Plan.

(6th Cir. Appx. 224-225)

The courts below found that the promise contained in Article III, Section 5(a) of the Insurance Program Agreement that health benefits "shall be continued" after an employee retires "indicates an unambiguous intent for Plaintiffs' health care benefits to continue after the CBA terminated." Pet. Appx. 24a-26a. This conclusion was buttressed by the fact that Article I, Section 3(b)(7) linked retirees' health care benefits to pension eligibility – a status that lasts for life. Pet. Appx. 26a-28a.

In response to VCENA's argument under the CBA that some retirees could receive lifetime health coverage even if they were not eligible for a pension, the courts below recognized that this might create an ambiguity in the contract language that could warrant a review of evidence extrinsic to the CBA to discern the parties' intent.[8] Pet. Appx. 28a-29a.

The courts then looked to the contemporaneous Summary Plan Description which clearly and unambiguously provided for lifetime coverage, declaring:

> If you terminate employment with Euclid at age 65 or older for any reason other than discharge for cause, all of your Health Care coverages will be continued for the rest of your life without cost to you. Euclid also pays the full cost of

---

[8] Although the only evidence extrinsic to the CBA cited by the courts below was the Summary Plan Description, there was also undisputed evidence from testimony of company officials that when employees retired they were told unequivocally that their benefits would be provided to them at no cost for life and that they could never be changed.

> Health Care coverages for surviving spouses and eligible children of deceased pensioners and of employees who die after they are eligible to retire voluntarily under the Euclid Pension Plan.

Pet. Appx. 29a-30a.

Citing the general duration clause out of context, VCENA asserts that "a clear reading of the Insurance Plan Supplement is that the benefits provided for therein were to terminate when the CBA terminated, i.e., on March 14, 1986." Pet. 7. However, as the courts below carefully analyzed the clause cited by VCENA, they concluded that the cited duration clause "does not reference either the insurance benefits or coverage. Consequently it is not clear that the instant duration clause was intended to terminate insurance benefits upon the termination of the CBA." Pet. Appx. 32a.

The courts went on to note that a "nearly identical" duration clause was contained in the Pension Plan agreement and VCENA admitted that the clause was never intended to terminate the Pension Plan at the end of the CBA, but "contends that the same language should have one meaning as to one benefit and an opposite meaning as to another benefit," a contention the courts below rejected. Pet. Appx. 33a-34a.

The courts below employed a similarly careful review of the CBA's promise of lifetime life insurance benefits. Article II, Section 3(b)(1) promises retirees "Continuing Life Insurance after Age 65." Pet. Appx. 40a-41a. Section 3(b)(3) states that "No employee contributions for Life Insurance are required after

attainment of age 65." Further, Article II, Section 3(b)(1)(i) provides that while the ultimate amount of life insurance will be reduced until the amount is 1 - 1/2% the amount in force on that individual's 65th birthday, "[s]uch remaining Life Insurance will be continued thereafter until the death of the employee." (6th Cir. Appx. 235).

The courts below concluded that, "[t]aken together, these two provisions [Article II, Section 3(b)(1)(ii) and Section 3(b)(3)] demonstrate that the CBA intended to provide lifetime, fully funded life insurance benefits to retirees." Pet. Appx. 41a. The courts rejected VCENA's arguments that VCENA either had reserved a right to terminate life insurance coverage or could limit the coverage to the duration of the CBA. Pet. Appx. 41a.

ARGUMENT

I. THERE IS NO SPLIT AMONG THE CIRCUITS

A. The Circuits Agree That No Automatic Presumptions Apply

VCENA's fundamental argument is that there is a three-way split among the circuits regarding the legal principles applied to determine whether non-pension retiree benefits are vested for life.

According to VCENA, (1) the Fourth, Sixth, and Eleventh Circuits hold, as announced by the Sixth Circuit in *UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983), cert denied, 465 U.S. 1007, 104 S. Ct. 1002, 79 L.Ed. 2d 234 (1984), that there is a presumption that retiree benefits are vested for life, (2) the First,

Second, Third, Fifth, and Eighth Circuits hold, as announced by the Third Circuit in *UAW v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999), that there is no presumption of vesting, and (3) the Seventh Circuit in *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000) holds that there is a presumption against vesting.

This so-called split simply does not exist. All courts agree that there is no presumption for or against vesting.

In order for VCENA to make its argument, it had to misrepresent the Sixth Circuit's 27-year-old *Yard-Man* decision and completely fail to cite its more recent decisions beginning with *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006), cert denied, *CNH Am. LLC v. Yolton*, 549 U.S. 1019 (U.S. 2006), which clarified any misconceptions that any party or court might have had about the *Yard-Man* analysis.

In *Yolton*, the Sixth Circuit stated flat-out that there is no presumption of vesting. The *Yolton* Court clarified the scope of the *Yard-Man* inference, stating that:

> [T]he inference functions more to provide a contextual understanding about the nature of labor-management negotiations over retirement benefits. That is, because retirement health care benefits are not mandatory or required to be included in an agreement, and because they are "typically understood as a form of delayed compensation or reward for past services" it is unlikely that they would be "left to the contingencies of future negotiations." *Yard-*

> *Man*, 716 F.2d at 1481-82 (citations committed). When other contextual factors so indicate, *Yard-Man* simply provides another inference of intent. **All that *Yard-Man* and subsequent cases instruct is that the Court should apply ordinary principles of contract interpretation.**

Yolton, 435 F.3d at 579-580 (6th Cir. 2006)(emphasis added).

As the Sixth Circuit stated in *Yolton*: "This Court has never inferred an intent to vest benefits in the absence of either explicit contractual language or extrinsic evidence indicating such an intent." *Id.* at 580.

Prior to *Yolton*, some courts mistakenly stated that the Sixth Circuit presumed that all collectively bargained retiree benefits were vested.[9] However, in *Yolton* the Sixth Circuit clarified that it, like all circuits throughout the country, looks to the language that creates the promise and applies ordinary principles of contract interpretation to determine whether the parties intended to create vested lifetime benefits.

This principle has been confirmed by the Sixth Circuit on at least six occasions since *Yolton*. *Reese v. CNH Am. LLC*, 574 F.3d 315 (6th Cir. 2009); *Schreiber*

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[9] For example, the Third Circuit characterized the Sixth Circuit's position on this issue in terms of a presumption in *Skinner*, 188 F.3d at 140 ("We cannot agree with *Yard-Man* that there exists a presumption of lifetime benefits...").

v. Philips Display Components Co., 580 F.3d 355 (6th Cir. 2009); *Cole v. ArvinMeritor*, 549 F.3d 1064, 1069 (6th Cir. 2008); *Noe v. PolyOne Corp.*, 520 F.3d 548 (6th Cir. 2008); *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437 (6th Cir. 2007); and *Wood v. Detroit Diesel Corp.*, 213 Fed. Appx. 463 (6th Cir. 2007)(unpublished opinion).

VCENA's argument that the circuits disagree as to whether a presumption exists has long been laid to rest. Since *Yolton*, there have been only two relevant circuit cases, both of which agree there is no presumption of vesting.[10]

The First Circuit recognized the settled state of Sixth Circuit law on this question in *Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 217 (1st Cir. 2006), rejecting the claim that *Yard-Man* created a presumption in favor of vesting ("In *Yolton*, 435 F.3d 571 [(6th Cir. 2006)], the court said: 'All that *Yard-Man* and subsequent cases instruct is that the court should apply ordinary principles of contract interpretation. *Id.* at 580.'").

Similarly, the Fifth Circuit in *Nichols v. Alcatel*, 532 F.3d 364, 377 (5th Cir. 2008), applied ordinary principles of contract interpretation in the

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[10] VCENA cites to *Alday v. Raytheon Co.*, No. CV 06-32 TUC DCB, 2008 U.S. Dist. LEXIS 62747 (D. Ariz. Aug. 5, 2008) in an attempt to show that a district court case in the Ninth Circuit creates a circuit split. VCENA mischaracterizes the holding of this case. In *Alday* the court acknowledged that *Yard-Man*, as clarified by *Yolton*, contains no presumption of vesting. *Alday* looked to *Yard-Man* as the "contextual guide for interpreting CBAs." *Id.* at **16-18.

interpretative framework established by *Yard-Man* and *Yolton* (if a CBA is found to be ambiguous, extrinsic evidence may be introduced to determine parties' intent).

VCENA also argues that there is a split by attempting to extract an automatic presumption **against** vesting from Seventh Circuit retiree health care decisions. No such presumption exists.

As Judge Posner observed in *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 544 (7th Cir. 2000), the only time a presumption would arise is in the atypical situation where a contract contains *no* language that could reasonably be construed to vest retiree benefits:

> Our presumption against vesting, it is important to emphasize, kicks in only if all the court has to go on is silence....The presumption is thus a default rule, that is, a rule to be applied when there is no other evidence.

This is not a presumption against vesting. This is simply recognition of the undisputed principle that "ERISA does not create any substantive entitlement to employer-provided health benefits." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

The extent to which retirees overall may have fared better in the Sixth Circuit than in the Seventh Circuit is directly related to the commonality of the underlying facts and collective bargaining agreements involved in the Sixth Circuit cases.

A majority of Sixth Circuit cases, due to geographical realities, arose out of auto industry

contracts, with their own distinct patterns and history.[11] If virtually identical contracts are negotiated by the same union in the same industry, one would hope and expect that the same outcome would be reached in each case, as it was here.

In contrast, the Seventh Circuit cases arise out of a more diverse group of industries—brewery,[12] electrical,[13] steel,[14] and auto,[15] each with its own pattern and history.

The difference in results reflects the difference in the industry contracts, not any substantive difference in the applicable legal standard. The Sixth Circuit does not have an outcome-determinative rule, as

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[11] *Cole v. ArvinMeritor*, 549 F.3d 1064 (6th Cir. 2008); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006), cert denied, *CNH Am. LLC v. Yolton*, 549 U.S. 1019 (U.S. 2006); *McCoy v. Merdian Auto Sys., Inc.*, 390 F.3d 417 (6th Cir. 2004); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996).

[12] See *Zielinski v. Pabst Brewing Co.*, 463 F.3d 615 (7th Cir. 2006); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434 (7th Cir. 1998).

[13] *Barnett v. Ameren Corp.*, 436 F.3d 830 (7th Cir. 2006).

[14] *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995); *Senn v. United Dominion Indus., Inc.* 951 F.2d 806 (7th Cir. 1992).

[15] *Cherry v. Auburn Gear, Inc.*, 441 F.3d 476 (7th Cir. 2006); *Diehl v. Twin Disc., Inc.*, 102 F.3d 301 (7th Cir. 1996); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993).

evidenced by the fact that retirees frequently fail in the Sixth Circuit.[16]

B. All Retiree Benefit Cases Turn on All Relevant Facts, Not on the Presence or Absence of Talismanic Words or Phrases.

1. VCENA's "Shall be Continued" Argument

VCENA argues that circuits differ on whether the words "shall be continued" automatically vest benefits. The answer from the circuits, not surprisingly, is that it depends on the factual context.

VCENA argues that the Sixth Circuit's decision in *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064 (6th Cir. 2008), the First Circuit's decision in *United Steelworkers of Am., AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987), the Third Circuit's decision in *Skinner* and the Seventh Circuit's decision in *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992) adopted conflicting rules with respect to the same retiree health care provisions. A cursory review of the cases shows that the language examined in each of the cases was dramatically different.

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[16] See, e.g., *Harps v. TRW Auto.*, No. 09-3214, 2009 U.S. App. LEXIS 24242, *13-14 (6th Cir. Nov. 3, 2009)(unpublished opinion); *Mauer v. Joy Techs., Inc.*, 212 F.3d 907, 919 (6th Cir. 2000)(summary judgment against certain retirees); *Bittinger v. Tecumseh Prods. Co.*, 201 F.3d 440 (6th Cir. 1999); *UAW v. Cleveland Gear Corp.*, No. 83-3839, 1984 U.S. App. LEXIS 13700 (6th Cir. Oct. 24, 1984)(unpublished opinion).

In *Cole*, like the instant case, the CBA language stated health care coverage an employee had "at the time of retirement...shall be continued thereafter" for retirees and "any eligible dependents." *Cole*, 549 F.3d at 1068. In *United Steelworkers of Am., AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987), the CBA said that the company "shall pay" for retiree life insurance and that medical benefits "shall be provided" to union members who retire. The CBAs at issue in *Cole* and *Textron* specifically refer to health benefits continuing and being provided during retirement.

In *Skinner*, the CBA provided that the company "will continue to provide" specific medical coverage. 188 F.3d at 135. The Third Circuit noted, however, that this language had been changed from contract to contract depending on whether the new contract continued previous coverage or changed the previous scope of coverage. If the latter, the contract contained the words "would be instituted," for example, rather than "will continue." The Third Circuit found, based on this unique bargaining history, the words "will continue" referred to coverage, not to duration. 188 F.3d at 142-143. The Third Circuit also relied on the fact that the purported retiree health care language did not specifically mention retirees at all:

> the CBA provisions make no material distinction between active employees and retirees in this regard. The only reasonable conclusion—if one begins with the uncontroversial premise that benefits for active

> employees were not vested—is that benefits for retirees were likewise not vested.

Id. at 144.

After examining other parts of the CBA and the bargaining history described above, the Third Circuit in *Skinner* determined that the contract provisions were not ambiguous and held, based on the particular facts described above, that the benefits were not vested. *Id.* at 147.

VCENA claims that the Seventh Circuit in *Senn* applied yet a third outcome-determinative rule to "will continue" contract language. In fact, as the Seventh Circuit later pointed out in *Bidlack v. Wheelabrator*, 933 F.3d at 608, the language in *Senn* did not merely say that retiree benefits "will continue":

> The language in *Senn* was weaker: it was that the company "will continue for retired employees" a specified premium contribution. And the final agreement between the company and the union in that case, which could be thought declaratory of earlier understandings, said that coverage "shall be continued during the *term of this agreement*."

As the circuit decisions cited by VCENA above show, neither the Sixth Circuit in *Cole*, nor the First, Third or Seventh Circuits based their decisions on a myopic reading of the phrase "shall be continued." Rather, all the circuits to address retiree health care disputes arising from CBAs have applied traditional rules of contract interpretation to the unique facts of each case.

2. VCENA's Pension Linkage Argument

VCENA next asserts that courts below found it unduly significant that the CBA contained language linking the Retirees' health and life insurance benefits to pension eligibility. To the contrary, the courts below did not rely on the linkage of Retirees' health care benefits to pension eligibility as the determinative factor, but simply articulated that the linking of benefits supported the plain reading of the contract language that unambiguously vested benefits.

Regardless, the cases cited by VCENA, *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130 (2d Cir. 1999) and *Vallone v. CNA Fin. Corp.*, 375 F.3d 623 (7th Cir. 2004), are not at all inconsistent: a review of the facts shows that the decisions turned on very different written provisions.

In *Joyce* and *Vallone*, the courts rejected vesting claims because explicit reservation of rights clauses gave the employers the right to modify their benefits. In *Joyce*, the Second Circuit rejected a vesting argument where a summary plan description given to retirees specifically stated that their retiree medical benefits "are not contractual in nature, and they may be modified from time to time or terminated as a result of contractual negotiations."[17] 171 F.3d at 132. In *Vallone*, the Seventh Circuit examined a plan unilaterally promulgated by the employer. The plan documents contained a reservation of rights provision which stated that retiree coverages "may be amended,

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[17] See *Joyce v. Curtis-Wright Corp.*, 992 F. Supp. 259, 263 (W.D.N.Y. 1999), setting forth factual details.

revoked, or suspended at the Company's discretion at any time, even after your retirement." 375 F.3d at 636.[18]

3. VCENA's Durational Clause Argument

VCENA argues that the Seventh and Eighth Circuits have reached different interpretations of durational clauses than the Sixth and Eleventh Circuits, which have held that a general durational clause in the CBA did not preclude vesting of retiree health care benefits. There is no conflict among these decisions.

In *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1513 (8th Cir. 1988), cited by VCENA, the CBA specifically provided that retiree insurance coverage could be "amended, modified or supplemented in collective bargaining agreement between the parties." The Eighth Circuit predictably concluded those benefits could be modified. 836 F.2d at 1514-1515.

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[18] The Seventh Circuit's *Vallone* decision was also based on the court's finding that the plan documents granted the company discretion in interpreting the plan, and that the company's interpretation must therefore be upheld unless it was arbitrary and capricious, as held in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). 375 F.3d at 631-632. This grant of discretion is typical of unilaterally-promulgated benefit plans and rare in collectively bargained plans. Disputes arising from CBAs therefore, are typically reviewed under a *de novo* standard under which the employer and retiree interpretations of applicable retiree health care provisions are entitled to equal weight. *See* discussion *infra* pp. 27-28.

In *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 567 (7th Cir. 1995), the plan stated that retiree benefits terminated "upon the date the Plan is terminated or amended to terminate the Retiree's [or his dependent's] coverage." The Seventh Circuit held this "express termination language is plainly inconsistent with any intent to vest benefits." *Id.*

The Sixth Circuit agrees with the Seventh and Eighth Circuits–when a durational clause is retiree-benefits specific, those benefits can be terminated after the CBA expires. *Harps v. TRW Auto.*, No. 09-3214, 2009 U.S. App. LEXIS 24242, *13-14 (6th Cir. Nov. 3, 2009)(unpublished opinion)(operative language of "[t]his clause shall not be construed to convey any rights to those beyond the term of this agreement" which concluded the retiree medical benefits section of the CBA, unambiguously disclaimed employer obligation to provide benefits beyond the term of the CBA).

The Eleventh Circuit follows the other circuits, in that unless there is a provision that terminates benefits upon the expiration of a collective bargaining agreement, language that individuals receiving benefits "shall not have such coverage terminated or reduced so long as the individual remains retired from the company or receives a surviving spouse's benefits, notwithstanding the expiration of this [basic] agreement" is a clear intent that benefits survive after a CBA terminated. *United Steelworkers of Am., AFL-CIO-CLC v. Connors Steel Co.*, 855 F.2d 1499, 1504 (11th Cir. 1988); *See also Carriers Container Council, Inc.*, 896 F.2d 1330, 1339 (11th Cir. 1990)(a general durational clause that lacks a "cutoff date" for benefits does not terminate vested retiree benefits).

The general durational clause examined by the courts below in the instant case does not mention retirees and contains no statement that retiree benefits could be terminated or modified by subsequent negotiations. It is simply not possible to conjure a conflict between the Sixth, Seventh, Eighth and Eleventh Circuits.

C. No Circuit Split on How Collectively-Bargained and Unilaterally-Provided ERISA Benefit Cases Are Treated

VCENA's quest for a circuit conflict includes its argument that some circuits analyze vesting claims arising out of non-bargained retiree health care plans by a more stringent standard than claims under collectively bargained plans.[19] As shown below, VCENA is incorrect.

The applicable standard in all retiree vesting claims is whether the parties intended to provide vested, lifetime benefits. The task of courts analyzing collectively bargained plans is, of course, slightly different than the analytic task of courts examining unilaterally-drafted plans. In the former situation, the courts must determine the intent of union and company bargainers in arms-length labor negotiations, applying the tools the courts have developed to determine intent in that context. In the latter situation, the courts need only determine whether *one* party, the employer, intended to waive its right to

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[19] This case involves a collectively bargained contract, and therefore is not a useful vehicle for examining retiree health care claims under non-bargained plans.

terminate benefits. Thus, one would expect that as a factual matter, retirees claiming vested rights arising out of unilateral plans would generally fare worse in the nations' courts than retirees claiming vested benefits under collective bargaining agreements.

This expectation is borne out in the case law. Not surprisingly, the facts in cases involving plans drafted unilaterally by employers typically demonstrate, unequivocally, that the employer did not intend to waive its right to terminate retiree benefits. Employers who unilaterally promulgate their plans, unlike employers who must negotiate a collective bargaining agreement with a union, are free to insert ironclad reservation of rights into the governing documents.[20] *See Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 232 (1st Cir. 2006)(benefits were not vested when there is express language that a company reserves the right to amend, modify or terminate even promises for lifetime benefits); *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896, 900 (3d Cir. 1995)(retiree benefits not vested despite summary plan description that contained the phrase "when you retire, your medical benefit will be continued for the rest of your life" because of employer's reservation of rights clause to change or terminate benefits at any time); *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 636 (7th Cir. 2004)(reservation of rights provision allowed company to amend, revoke or suspend retiree benefits at the

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[20] Similarly, employers drafting unilateral plans are free to grant themselves interpretive discretion, which means that the employer's denial of a vesting claim is reviewed by the courts under a deferential arbitrary and capricious standard. *See* footnote 18, above.

discretion of the employer at any time, even after employees retired). These factual differences distinguish vesting cases arising out of non-bargained plans from vesting claims based on collective bargaining agreements.[21]

The three cases involving retiree vesting claims under non-bargained plans cited by VCENA further demonstrate the point. In each case, the vesting claim was dismissed because the employer drafted the unilateral plan to include a reservation of rights clause retaining its right to modify or terminate the benefits. *See Sprague v. General Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 856 (4th Cir. 1994); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996).

Prior to the Sixth Circuit's decision in *Yolton*, some circuits believed that the Sixth Circuit applied a presumption in favor of vesting in collectively bargained cases and on that basis indicated that a different legal standard might apply with respect to non-bargained plans. Petitioner cites several of those pre-*Yolton* cases. See, for example *Rossetto*, 217 F.3d at 543 (7th Cir. 2000). It is now clear, however, that no presumption is applied by the Sixth Circuit, and that the Sixth Circuit requires express language or adequate extrinsic evidence to uphold any retiree vesting claim, regardless of whether the benefits were

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[21] In the instant case, it is undisputed that there was no reservation of rights clause contained in either the CBA or the summary plan description.

unilaterally promised or collectively bargained. *See* 435 F.3d at 579.[22]

II. THE DECISIONS BELOW ARE CONSISTENT WITH DECISIONS OF THIS COURT

VCENA argues that the Sixth Circuit's decisions are in conflict with this Court's decisions in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995) and *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359 (1980) because the Sixth Circuit allegedly does not recognize the difference between discretionary welfare benefits and the mandatory vesting provisions applicable to pension benefits under ERISA. Pet. 23-24.

This characterization is squarely contradicted by the express language throughout the Sixth Circuit's

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[22] The only post-*Yolton* case cited by VCENA in support of this argument, the unpublished 2006 decision in *Trull v. Dayco Prods.*, No. 04-2109, No. 05-1591, 178 Fed. Appx. 247; 2006 U.S. App. LEXIS 10640 (4th Cir. Apr. 28, 2006), merely emphasizes that there are inherent factual differences between bargained and non-bargained cases. The latter type of case, the *Trull* court noted, involves, "....an employer's waiver of 'its statutory right to modify or terminate benefits. . . by voluntarily undertaking an obligation to provide vested, unalterable benefits'" rather than rights arising out of collective bargaining agreements. *Id.* at 250. In *Trull*, a collective bargaining case, the employer and the union bargained language which specifically stated that the agreement was not intended to waive, modify, or limit retirees' rights to medical benefits. The *Trull* court contrasted this with the Fourth Circuit's decision in *Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994), a non-bargained case which included the usual reservation of rights clause permitting termination of benefits. *Id.* at 856.

jurisprudence. As the Sixth Circuit stated in *Reese v. CNH*, and a multitude of cases before it:

> ERISA makes a promise to pay a covered "pension" binding at retirement, 29 U.S.C. § 1053(a), but it exempts "employee welfare benefit plans" from this requirement, *see id.* § 1051(1). Thus, while ERISA heavily regulates promises to provide pension benefits, health benefits are purely a matter of contract--permitting a company to guarantee health benefits for life or to make them changeable, or even terminable, at the will of the company.

574 F.3d at 321 *citing Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir. 2008) and *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998); *See also Schreiber v. Philips Display Components Co.*, 580 F.3d 355, 363 (6th Cir. 2009); *Helwig v. Kelsey Hayes*, 93 F.3d 243, 248 (6th Cir. 1996).

VCENA proposes, in effect, that all courts should abandon traditional contractual analysis, which seeks to determine the intent of the parties to CBAs, and instead adopt a conclusive rule regardless of what the evidence as to the parties intent actually is. VCENA cites *Litton Fin. Printing v. NLRB*, 501 U.S. 190 (1991) in support of this proposal.

The *Litton* decision, to the contrary, endorses the traditional approach to contractual interpretation adopted by the circuits in retiree health cases arising under a CBA. *Litton* addressed the question of whether a dispute (unrelated to retiree health care) which arose after the termination of a CBA was arbitrable under that agreement's grievance procedure. In *Litton*, the

Court stated that whether the rights continue beyond the termination of a CBA is "determined by contract interpretation. Rights which accrued or vested under the agreement, will, as a general rule, survive termination of the agreement." 501 U.S. at 207.

CONCLUSION

For the reasons set forth above, VCENA's request for review should be denied.

Respectfully Submitted,

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